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The Government and Wolfenden

THE debate in the House of Lords last week on the Report of the Wolfenden Committee was remarkable for the courageous statement of the ARCHBISHOP OF CANTERBURY in favour of the majority report on homosexual offences (with a possible reservation in respect of sodomy), and for the Government's decision to shelter behind public opinion. We are not surprised that the Government have found it difficult to make up their minds: it is a difficulty most of us share to a greater or less degree, but it is surely wrong to stay neutral for an indefinite period. "There are cases," said the LORD CHANCELLOR, ". . . when it may well be the duty of a Government to lead rather than to follow public opinion, but in a matter of this kind the general sense of the community . . . is an important feature; and the community is entitled to its view as to what affects society as a whole . . . there can be no prospect of early legislation on this subject." As we have stressed on previous occasions, to agree with the majority report does not imply condonation of homosexual practices: it merely conveys the opinion that the criminal law is not an effective way of dealing with them. There is ground for the fear that the continuance of criminal penalties will largely nullify the good which doctors can do. As the Archbishop said, "Into this kind of nightmare world . . . there can be no entrance for the forces of righteousness until the offences are made not criminal . . . the fresh air of normal morality will begin to circulate . . . Those who are involved . . . will be set free to talk to others outside without giving anybody away to the law. They will seek advice openly . . . It will be all the more easy, I think, to convince them of the restraints of common sense and Christian morality when they are delivered from the fears, the glamour and even the crusading spirit of the rebel against law and convention who can claim to be made a martyr by persecution." Lawyers can only add that the wisdom of retaining a criminal offence of which only a small proportion of those offending are convicted is open to question.

The Practice of the Law

THE valuable information which comes under the heading "The Practice of the Law" in the *Law Society's Gazette* includes in the current issue a note warning solicitors that the undertaking to pay the Official Solicitor's costs, charges and expenses, which it is the practice to require on an application under r. 66 of the Matrimonial Causes Rules, 1957, to appoint the Official Solicitor as guardian *ad litem* of an infant

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or a person of unsound mind, is binding upon the solicitor personally. The solicitor, it is stated, should satisfy himself that the client is in a position to pay the costs or he should obtain from him and hold available a sum sufficient to cover them. In a few cases where the petitioner was not an assisted person, Divorce Commissioners have limited the amount to be contributed, and the Council state that in such cases the solicitor becomes personally liable for the difference between the amount the petitioner is ordered to pay and the actual amount of the Official Solicitor's costs. Solicitors, it is stated, should inform counsel of the existence of any undertaking given to the Official Solicitor, so that if necessary the attention of the court may be drawn to the fact at the time when the order for costs is made. Also under this heading appear notes on a solicitor's entitlement to charge for work in connection with applications for Sched. II certificates. After discussions with the Taxing Masters the conclusion has been reached that the right depends upon retainer, which may well have ended at the time of the application, and that therefore in the interests of public relations and because of the legal doubts about the validity of such a charge, the Council stress its undesirability.

Compensation for Road Injuries

MR. ROBERT S. W. POLLARD, a solicitor whose writings on legal subjects are well known to members of the legal profession, contributes an article to the winter, 1957, edition of *The Plain View*, in which he recommends that the law in Great Britain should be changed so as to impose absolute liability by adopting for bodily injuries caused by road traffic the provisions of s. 40 (2) of the Civil Aviation Act, 1949, after deleting from this section the exception of loss or damage caused by the negligence of the person suffering it. He further proposes that traffic victims should be able to sue an insurance company direct and that the Motor Insurers' Bureau should be confirmed by statute. Many accidents, he argues, happen when there are no witnesses about, and *ex gratia* payments are in no way relevant to the real damage and loss. The findings of a Select Committee which reported in 1938 are quoted in support of the arguments in favour of the reform, and there is full reference to experience abroad. In eleven out of the thirteen countries about which the Ministry of Transport had obtained information in 1938, negligence was assumed on the part of the motorist till the contrary was proved. Proof that any practical difficulties about putting a rule of absolute liability into operation together with a scheme for compulsory insurance can be overcome is cited from Saskatchewan, where a statute to that effect has been in operation following a Government committee's report of 1947.

The Public Record Office

THE first reading of the Public Records Bill, which proposes to transfer the direction of the Public Record Office from the Master of the Rolls to the Lord Chancellor, and provides for the appointment of a Keeper of the Public Records, has been welcomed by LORD EVERSHED, speaking at a meeting of the Historical Manuscripts Commission on 11th December. No one has shown more zeal for the preservation of public records than Lord Evershed, and it is good to know that the ancient relationship of the Master of the Rolls to the records is to be partially preserved by continuing his responsibility for the records of the Chancery of England.

Hire-Purchase and Debentures

AN instructive sidelight on a little known branch of hire-purchase practice is thrown by articles in the September and October issues of the *Bankers' Magazine* on the results of a survey carried out by the Oxford Institute of Statistics into the use of hire-purchase by a sample of 860 firms, employing between ten and 500 employees each. The conclusions are reached that hire-purchase is more frequently used by the more rapidly growing firms, and that there is a fairly close relationship between the use of hire-purchase and the use of overdraft facilities. A point is made that the cost of issuing debentures or shares is usually far too high either for a small company or for the amounts for which hire-purchase arrangements might provide an alternative source of funds. If hire-purchase is being used as an alternative to borrowing, it may be that at some future time the courts will have to reconsider the present law, which appears to be that anyone can raise money from a finance company by transferring his property to the company and taking it back on hire-purchase, and that provided that there is no positive evidence that the transaction is really a loan, and the documents are in order, there is no need to register the transaction under the Bills of Sale Acts or under s. 95 of the Companies Act, 1948. The effect of cases like *Yorkshire Railway Wagon Co.* v. *Maclure* (1882), 21 Ch. D. 309, seems now to be wider than was originally intended. It may well be that a more strict enforcement of the provisions as to public registration of financing transactions is in the public interest. If such enforcement cannot be obtained from the courts, it will be Parliament's duty to investigate the position and, if necessary, to legislate.

Accountability for Estate Duty

THE report of the Comptroller and Auditor-General which accompanies the Revenue Departments Appropriation Accounts, 1956–57, published on 3rd December, states that the Finance Act, 1894, provides that, where property passes on the death of a person and the executor is not accountable for the estate duty on it, certain other classes of persons to whom the property passes shall give an account of it to the Commissioners of Inland Revenue. Anyone who fails to do this is liable to pay £100 or double the unpaid duty. No case can be traced in which proceedings for penalties have been taken, because of doubts about the legal position, but the Board has been advised that where property was deliberately omitted subsequent payment of arrears of duty and interest thereon did not purge the offence and penalty proceedings would be competent. The Board said they proposed to base future practice on this advice. New forms of affidavit were made available to the public on 1st August, 1957, but the Comptroller states that legislation would be required in order to make the Board's power of imposing penalties fully effective.

Variation of Trusts

OUR comments on the Variation of Trusts Bill, on pp. 891–92 in our issue of 30th November, gave the unfortunate impression that only members of the Bar were supporting the Bill. In fact it is backed by several solicitors in the House of Commons, namely, Major W. W. HICKS BEACH, Mr. H. R. GOWER, Mr. JOHN HAY and Mr. ERIC FLETCHER.

THE LOCAL GOVERNMENT BILL

THE reform or reorganisation of local government in England and Wales has been the subject of debate for many years. Latterly there have been discussions between the various associations of local authorities with a view to arriving at some agreement on the subject, followed by the publication by the Government of three White Papers on the Areas and Status of Local Authorities (Cmd. 9831 in 1956), the Functions of County Councils and County District Councils (Cmnd. 161 in 1957) and Finance (Cmnd. 209 in 1957), respectively. Since the publication of these White Papers there have been further discussions. All these various deliberations have now culminated in the presentation to Parliament of a new Local Government Bill.

On a first look at the Bill one is impressed, perhaps, not so much with what it says, but with what it does not say. It follows strongly in the tradition of recent legislation in leaving many important matters to be settled by order, regulation or direction of a Minister; and in this respect must be regarded as a somewhat unsatisfactory piece of prospective legislation.

Finance and loosening of central control

Part I of the Bill covers the subject of finance embodied in the last of the three White Papers, Pt. II covers the subject of the areas and status of local authorities embodied in the first White Paper, and Pt. III deals with the distribution of functions between county and county district councils, though in a very restricted way when compared with the proposals which were set out in the second White Paper. The remaining part of the Bill, Pt. IV, contains a number of general and supplementary provisions.

The most immediately controversial Part of the Bill will undoubtedly be Pt. I. The main object of this Part is to make local authorities more independent of the central government, and this it seeks to achieve by substituting a system of general grants for many of the percentage grants on which they are at present dependent, and by increasing their income from rates. A percentage grant has to be spent on the service to which it is allocated, and, in general, the objects on which it is spent have to be approved by the Government department concerned. This system of grants has led to meticulous and detailed control by the central government of some of the most important activities of local authorities and to the criticism, whether just or not, that they have become merely the agents of the central government. A general grant, on the other hand, is a block sum paid to a local authority which they are free to spend as they wish among the various services for which they are responsible and on whatever object within a particular service they please. In other words, money from a general grant is free income, just as is rate income, which can be spent as the authority please within the limits of their statutory functions.

Clause 1 of the Bill, therefore, substitutes as from and including the financial year 1959-60 general grants for the percentage grants hitherto payable for the education service, the local health services, the fire service, the care of children, for town and country planning, and for various minor services. Percentage grants will, however, continue to be paid for the important service of maintaining and improving classified roads. The estimated total for 1956–57 of the percentage grants to be superseded is £298m.

This large accession of free, as distinct from tied, income must undoubtedly increase the independence and responsibility of the local authorities, mainly the county councils and county borough councils, who are to receive it, and may well be welcomed in principle by them. On the other hand, it is attacked by many of those interested in education (the percentage grant for the education service being by far the largest of the superseded grants), who fear that money which should be spent on education may be spent on something else, and by those who doubt whether local authorities really are sufficiently responsible. Further, there are those, and they include many local authorities, who fear that the amounts of the general grants will not keep pace with necessary and desirable expenditure. Despite the controls associated with them percentage grants have certain advantages, particularly in an inflationary economy. Thus, under the percentage grant system, if the expenditure of an authority is suddenly increased by, say, an award of an increase in pay to teachers, or by a sudden influx of population necessitating the building of new schools, the percentage grant is automatically payable on the increased expenditure.

No such automatic adjustment can take place with the general grant, which is fixed for two-year periods. The all-important fixing of the total of the grant and its distribution between the recipients is left to be dealt with by order of the Minister of Housing and Local Government made with the consent of the Treasury, though it requires approval by a resolution of each House of Parliament, and cl. 2 only gives a very general instruction to the Minister to have regard, in fixing the grants, to the latest information available to him of the rate of expenditure on the services concerned and the current level of prices, costs and remuneration, together with any variation of the level which can be foreseen, to any probable fluctuation in demand for the services, and to the need for developing those services and the extent to which, having regard to general economic conditions, it is reasonable to develop those services. The Minister is also given power to vary the amount of general grant during the two-year period in the event of any unforeseen change in the level of prices, costs or remuneration "of such magnitude that it ought not to fall entirely on local authorities."

Clearly this advisory formula is open to endless argument and, so far as it relates to prices, costs and remuneration, would hardly be considered by anyone as a suitable price variation clause for insertion in a contract.

While the object of these provisions is to free authorities from many of the present detailed controls, it is reasonable that there should be some safeguard to ensure that they are generally maintaining a reasonable standard of efficiency in the services concerned. Clause 3, therefore, gives the Minister power, with the approval of the House of Commons, to reduce the grant to any authority who default in this, and it also gives power to the appropriate departmental Minister to prescribe "standards and general requirements" in respect of any of these services, to which regard is to be had in deciding whether a reduction should be made. Though much is left by this clause to be dealt with by regulations, it seems clear from the wording that detailed approvals will not have to be obtained by authorities as hitherto.

The increase in the rate income of local authorities (and this will benefit county district councils as well as the county and county borough councils) is achieved by cl. 9, which makes industrial and freight-transport hereditaments rateable at 50 per cent. of their net annual values instead of 25 per cent. The total net increase in rate income to local authorities for

1956–57, after allowing for a reduction of £20m. in Government grants to compensate for consequential loss of tax revenue, if this provision had then been in operation, is estimated at £10m.

Other clauses in Pt. I provide for the making by the Government of rate deficiency grants to local authorities, in substitution for the present Exchequer equalisation grants, to help the poorer authorities, and for the making, during a transitional period, of payments by authorities who gain by the new arrangements to those who lose.

Although the clause appears in Pt. IV, it is perhaps appropriate to mention here cl. 50, which extends the investment powers of trustees under s. 1 of the Trustee Act, 1925, so as to enable them to lend money to any county borough, county council or county district council in England and Wales (and also other authorities in Scotland and Northern Ireland) where the security for the money is all the revenues of the authority.

The existing pattern of local government

As a preliminary to an examination of Pts. II and III of the Bill it will perhaps be well to recall briefly the existing system of local government. England and Wales are for local government purposes divided primarily into county boroughs and administrative counties. In a county borough the county borough council are responsible for all local government functions. In an administrative county, however, the county council are responsible for some only of these functions; thus the county council are responsible, in particular, for the education service, for most of the highways, for the local health and welfare services, for the care of children under the Children Act, 1948, for town and country planning and for the provision of small holdings. Each administrative county is divided into a number of county districts; a county district may be a borough, an urban district or a rural district. Each rural district is divided into a number of rural parishes. Borough and urban district councils exercise in their areas the remaining local government functions not falling on county councils, of which the most important are housing, sewerage and refuse disposal, the provision of open spaces and burial grounds, street lighting, and the maintenance of unclassified roads. The functions of rural district councils are not so extensive, as unclassified roads remain with the county council and a few functions, such as lighting and the provision of open spaces and burial grounds, normally fall on parish councils. The existing legislation does, however provide for the exercise in some cases by borough and urban district councils of a certain size of one or two functions of the county council and for the delegation by agreement of some other functions to any county district council. The dividing line is, therefore, by no means clear, particularly as it may vary from county to county and district to district.

Review of areas

The main layout of the country into these various local authority areas came into being in the last century. With the passing of the years some towns have increased in size, development has overrun boundaries, and in some quarters many of the smaller authorities are no longer considered sufficiently strong to carry out modern responsibilities efficiently. The object of Pt. II of the Act is, therefore, to secure the review of the areas and structures of local authorities, except those in the metropolitan area around London which will receive attention under other legislation. This area, besides including London and Middlesex, extends well into Surrey, Kent, Hertfordshire and Essex.

Clause 17 sets up two Local Government Commissions, one for England and one for Wales, to carry out the review.

The duty of the Commissions (cll. 17 and 18) is to make such proposals for the alteration of the areas of administrative counties or county boroughs, including the constitution of new counties or county boroughs or the abolition of existing ones, as appear desirable to them " in the interests of effective and convenient local government." In five special review areas specified in Sched. III to the Bill, and sometimes known as conurbations, namely, the Tyneside, West Yorkshire, South East Lancashire, Merseyside and West Midlands areas, the English Commission have a similar duty in respect of the areas of county district councils (cl. 19). Further, if they propose the creation in a special review area of a new county with no county borough in it they may put forward proposals for the distribution of functions between the county council and the county district councils (cl. 20); this seems to envisage that the Commission may recommend, say, a Manchester County Council with various districts in the county, rather on the lines of the London County Council and the metropolitan boroughs.

Outside the special review areas the duty of reviewing the areas of county district councils rests on the county council (cl. 28), but this review will not start until the review of the boundaries of the county itself by the appropriate Commission has proceeded sufficiently far to make it practicable. It would seem, therefore, that these reviews of county district boundaries are some considerable time away.

Both the Commissions and the county councils have to report the result of their reviews and their proposals to the Minister (cll. 22 and 29). The Minister may give effect to the proposals with or without modification by order, which in the case of proposals by a Commission must be laid before Parliament. Elaborate provision is made for consultation with local authorities and other interested bodies in the carrying out of the reviews, for the giving of public notice of any proposals made to the Minister, for the consideration by him of objections and representations, and for the holding of public inquiries.

Clause 33 requires the Commissions and the Minister to assume that a population of 100,000 is sufficient to support the discharge of the functions of a county borough council. As, however, population is only one factor to be considered in deciding whether or not a town should be given county borough status, it does not follow that any town of this size will automatically become a county borough.

In order to give time for the new local government pattern to settle down, cl. 34 prohibits any local authority from promoting a Bill in Parliament for changing local government areas or status for fifteen years after the commencement of the Act.

One interesting innovation is the introduction of the " rural borough." There are in rural areas quite a number of very small but ancient boroughs. Their antiquity and history, together with their charter, have hitherto secured to them the full powers of a municipal borough, which their population and financial resources may be insufficient to sustain. Now the Bill gives power to the county council to propose in a review that they should, in effect, become a parish in the surrounding rural district. Though for practical purposes the borough council will be no more than a parish council, the titles of borough, mayor and deputy mayor and of town clerk are retained, as are the provisions, except any power to acquire land, of its charter.

Distribution of functions

As mentioned at the beginning of this article, Pt. III of the Bill deals with the distribution of functions in only a very

limited way when compared with the proposals in the relevant White Paper. It enables boroughs and urban districts having a population of 60,000 or more to secure as of right the delegation by the county council of functions relating to various local health services, except the ambulance service, under the National Health Service Act, 1946, and various allied Acts, and to become " excepted districts " for the purpose of the Education Act, 1944, which means in effect that they can exercise the county council's functions as education authority, except in relation, *inter alia*, to the training of teachers, university awards, higher technological education, boarding education and youth employment.

In special circumstances the Minister of Health or the Minister of Education, as appropriate, may agree that these functions should be exercised by the council of any other county district, but they are not entitled to them as of right. The Minister of Health may also agree in exceptional circumstances that a county district council should exercise the powers of the county council under the National Assistance Act, 1948, to provide residential or temporary accommodation to persons in need.

Though the Bill itself makes no other provision for distribution of functions, the review of areas under Pt. II may itself, by increasing the population and resources of an area, result in the conferment under existing legislation by agreement or otherwise (as e.g., under s. 32 of the Local Government Act, 1929, whereby an urban district having a population of 20,000 can claim to maintain and repair county roads in the district) of additional functions.

It will clearly be a number of years yet before the full result of the provisions of the Bill will be seen, and the changes will be many and great. Whether they will be worth it remains to be seen. Possibly there is not really so very much wrong with local government as it is to-day.

R. N. D. H.

WEDNESDAY, 18th DECEMBER

It is eleven years since 18th December fell on a Wednesday. There is nothing remarkable in that, but it is a periodical occasion which causes some doubt amongst those solicitors who have to advise clients whether they may keep their shops open all day, when in the normal course of events Wednesday would be their early-closing day.

The Shops Act, 1950, s. 1 (5) (re-enacting the Shops Act, 1912, s. 4), stated : " When a shop is closed during the whole day on the occasion of a Bank Holiday and that day is not the day fixed for the weekly half holiday, it shall be lawful for the occupier of the shop to keep the shop open for the serving of customers after the hour at which it is required under this section to be closed either on the half holiday immediately preceding, or on the half holiday immediately succeeding, the Bank Holiday." If one reckons Christmas as the Bank Holiday, that would be the day fixed for the weekly half holiday, so that the subsection does not apply and the shop must remain closed on the preceding Wednesday —questions are unlikely to arise in connection with the succeeding half holiday as the substantial business is of course before and not after Christmas. If, however, one looks to St. Stephen's Day as the Bank Holiday, the subsection says the shop can stay open " on the half holiday immediately preceding the Bank Holiday " which is Christmas Day. For this reason the National Chamber of Trade and most of its affiliated chambers and individual trade organisations have advised their members that if they normally close on Wednesdays they must remain closed on Wednesday, 18th.

However, the argument is not all on one side. Redgrave's Factories, Truck and Shop Acts, 19th ed. (Stone, Halsbury and the other text-books ignore the difficulty) states : " If two Bank Holidays come in the same week it is submitted that no half holiday need be given in either the preceding or subsequent week." This is based on *Todd, Burns & Co.* v. *Dublin Corporation* (1913), 47 I.L.T. 157. It is correct, but most misleading, since this case was one concerning the employment of staff on a half holiday, and not of remaining open. So far as remaining open is concerned, which is all that is mentioned in s. 1 of the 1950 Act, this case and opinion would be more suitably quoted in favour of saying that the shop should remain closed on the 18th. The case rested on what is now s. 17 (1), that no half holiday need be given to an assistant in the week before a Bank Holiday if the assistant is not employed on the Bank Holiday and if on one weekday in the week following in addition to the Bank Holiday the employment ceases not later than 1.30 p.m. It was argued that Wednesday being Christmas was not a weekday but a holiday, and as the assistant was employed all that week except on 25th and 26th, the second condition of the section was not complied with. Palles, C.B., emphatically rejected the contention, saying that Wednesday is still a weekday even when it is a Bank Holiday. In applying this case to s. 1, the learned authors of Redgrave assume that giving a half holiday, and not keeping open for one afternoon per week are synonymous, but the two clauses are differently worded and provision is also made elsewhere in the Act for different employees to have different half holidays.

The obvious loophole is to change the early-closing day. In almost all areas the local authority has fixed the early-closing day, in which case the only permitted closing days are that day, or Saturday. In certain areas, however, no order has been made and so the shops can close which day they please, but they may not change the day oftener than once in any period of three months. The Home Secretary in a memorandum to local authorities and others has advised that a change from the ordinary day in one week, and back to the ordinary day in the next week, counts as only one change. Avory, J., said : " I only wish to add that it must not be supposed that the court gives any countenance to the contention that a change of day by proper notice and a reversion in a subsequent week to the original early-closing day would constitute only one alteration of the early-closing day and could be legally carried out within the period of three months mentioned in the Act," and Shearman, J., said, " I agree " (*Owen* v. *Parry* (1914), 79 J.P. 64). The subsection which says " not oftener than once in three months " begins " Unless and until an order is made under this section " (by the local authority), so it is arguable that alternation between Wednesday and Saturday in an area where an order has been made can be carried out more frequently ; but the *dictum* of Avory, J., quoted above was in fact made in reference to an area where an order had been made.

To sum up, it seems that if your shopkeeper client wishes to stay open on Wednesday, 18th, you must advise him to take down his Wednesday closing notice on Monday, 16th, and post a notice saying he will close on Saturdays. He

will then be within the exception for Bank Holidays and can stay open on both Saturday, 21st and 28th (preceding for Christmas and subsequent for Boxing Day), and then he will take down the notice and revert to Wednesday closing on Monday, 29th. Perhaps he will tell you it is nonsense to post a notice saying he will close in order that he may stay open. It is not the only anomaly in the Shops Act or to do with shops. In 1912 an exception was made to allow the sale of spare aircraft parts to travellers out of hours—this exception still remains in the 1950 Act. A sunblind which may not be less than 8 feet from the ground does not make sense. There is room for revision of the shops law, and s. 1 of the 1950 Act should not be overlooked, if and when the recently demised Shops Bill is re-introduced.

P.S. If you are in a Thursday closing area you have got 313 shopping days to decide what advice you will give.

N. P.

THE FUTURE OF LEGAL AID

"It is now seven years since the Legal Aid Act came into operation: not a bad time to stop and ponder." These are the opening words of the recently published pamphlet, "The Future of Legal Aid."* "The Legal Aid Scheme has conferred immense benefits; it is an immeasurable improvement on its predecessor, the old Poor Persons' Procedure. The scheme has operated smoothly; despite the closest judicial attention, probings by newspapermen and a general disquiet by sections of the public at the idea of spending public money on private litigation, those who have operated the machinery of the Act have won for themselves general high regard."

Until the present, no publication has been issued which has appraised the working of the Legal Aid Scheme. Although the numerous suggestions in this pamphlet may go further than general agreement, there has been quite unexpected unanimity about the main conclusions. This is not surprising since the legal profession has for many years been pressing for the implementation of that part of the Act which deals with legal advice and with legal aid in domestic proceedings in magistrates' courts. The failure to put these parts of the Act into operation is certainly not the responsibility of those who had the management of the scheme. Indeed, for several years the annual reports of The Law Society on the Scheme and of the Lord Chancellor's Advisory Committee have stressed the imperative need to bring into force legal advice and legal aid in domestic proceedings.

Assessment of contributions

"It is cheeseparing by the Treasury that dictates the words of the regulations dutifully promulgated by the Lord Chancellor's department." Changes of Government have brought no alteration in the Treasury's outlook; growing inflation has, on the contrary, tightened the Exchequer's fist. Although the cost of living has risen steadily year by year since the end of the war, the upper ceiling of the Legal Aid Scheme (a disposable income of £420) has not been increased since the Rushcliffe Committee reported in May, 1945. The Legal Aid (Assessment of Resources) Regulations, which fix the scale of contributions, remain unchanged since August, 1950, although the National Assistance Board's Assessment Regulations have been amended four times since then. Most practising solicitors will have come upon cases where their clients have been assessed at contributions far beyond their practicable means; even more frequent is the case where a solicitor can inform his client that he can charge less and bring on proceedings more expeditiously without legal aid.

The extension of the Legal Aid Acts to county courts on 1st January, 1956, has highlighted the discrepancy between the assessment of contributions and the present cost of living. Assessments of £50—£60 in comparatively simple county court actions are responsible for the unexpectedly small number of people taking up certificates. In the first year of the county court scheme, only 2,200 certificates were granted. It is suggested in the pamphlet that the Assessment of Resources Regulations should be amended (to alter the ceiling of the scheme would require Act of Parliament) to provide that the first £5 of each single person's income should be disregarded, the first £7 of each married person, an extra £1 for each child under eleven, and £1 10s. for children over eleven receiving education or training.

The time taken for the issue of a certificate is unnecessarily long. The delay is in part due to the assessment of contribution being done by a separate department, the National Assistance Board. It is suggested that the N.A.B. officials involved should be transferred to the staff of The Law Society. Too many people's time is spent on certifying committees; it is suggested that the committees should be reduced in size to a full-time chairman, a full-time secretary and one practising member of the profession. The same reduced structure should be applied to the area committee; and the quasi-judicial functions of the area committee should be kept entirely separate from the administrative functions. In county court matters where the amount in dispute is less than £25, the secretary should be empowered to issue a certificate without calling the committee and should be allowed to assess the contribution himself (subject to the applicant having a right of appeal to the N.A.B.). Solicitors should be allowed to charge the Legal Aid Fund for their work in preparing an application for a certificate.

Scope of legal aid

Although the most urgent task is to bring in the Legal Advice Scheme, consideration should be given to the need to extend the scope of legal aid. This should in time be widened to cover all civil proceedings in magistrates' courts (Employers and Workmen Act, 1875, Public Health Acts, etc.). The restriction on actions of defamation, breach of promise, seduction and enticement should be removed so far as giving legal aid to defendants is concerned. It is important that legal aid should be made available for appeal to the House of Lords, where leave has been granted in the Court of Appeal; the continuance of the Poor Persons' Procedure in the Lords is unsatisfactory. The restriction on giving legal aid to those who are eligible for help from their trade unions or trade associations should be removed.

A costs insurance fund?

Much has been said and written about the unfairness to successful defendants where the plaintiff has been legally aided. It is also unsatisfactory that for six years after judgment an unsuccessful legally aided plaintiff should remain liable to an increase in the costs which he is required to pay whenever his means improve. It is proposed that

*Fabian Research Series. No. 191. Price 3s.

each contribution in a legally aided case should include a levy of £5, which should be paid into a costs insurance fund. On the basis of 1955–56, when there were 19,765 "winners" against 3,020 "losers," this would produce £35 towards the costs of each successful unaided defendant. If the 15 per cent. profit made by the scheme whenever an unaided person pays full costs was diverted into the costs insurance fund, it should be possible to guarantee costs up to £50. Should it be desired to guarantee full costs to a successful unaided party, it would be necessary to charge a tax upon the issue of each writ and plaint.

Legal advice

The original scheme for legal advice contained in the Act envisaged a number of itinerant legal advisers giving the equivalent of P.M.L. advice at fixed sessions. Since then both The Law Society and the profession have had second thoughts about the proposal, which would in probability lead to dead-end careers for young solicitors and an inferior service to that which practising solicitors could provide. It is proposed that legal advice should be given through existing practitioners. An initial interview could be given at a standard charge of 10s. Where more work is required, the solicitor would apply for authorisation to the legal aid committee in much the same way that a dentist under the National Health Scheme applies to the local health executive. When the work was sanctioned, the applicant would be required to pay in full up to a maximum of £4, and above that a proportion (those on National Assistance would be excused from payment). It is understood that The Law Society is at present working out a scheme with similar principles.

Criminal cases

Legal aid in criminal cases dates back much earlier than the civil scheme. The 1949 Legal Aid Act made certain proposals for improving criminal legal aid, but most of these remain unfulfilled due to financial stringency. In order to put an accused person into the same position as a civil litigant —of being able to choose his own solicitor and counsel freely —it is proposed that criminal legal aid should be assimilated with the civil scheme. Accused persons should be entitled to apply for an emergency certificate. If the accused is in custody, he should be entitled to send a message to any solicitor of his choice, who could then apply for an emergency certificate on his behalf (and receive payment for making the application). A certificate should entitle the accused to any service recommended by his solicitor, including the instruction of a private enquiry agent, payment of travelling expenses to potential witnesses, an independent medical report and advisory opinions from counsel. It is suggested that legal aid should be available as of right to any person charged with an offence involving a penalty greater than two years' imprisonment. In less serious cases legal aid should be available on payment to any person with an income or capital not exceeding the limits of the scheme. In order to recoup the financial outlay the court, upon conviction, should have discretion to impose a fine (not to exceed the cost of legal aid) payable to the Legal Aid Fund, where suitable, by instalments. In the event of acquittal contributions should be repaid to those who are required to pay towards their defence.

These are some of the main recommendations in the pamphlet; space prevents inclusion of the more detailed proposals. Perhaps the suggestion which will cause most controversy in the profession is that which recommends the introduction of laymen into the management of the scheme. This is not put forward out of any sense of criticism of the profession or of those members at present controlling the scheme's operation. The argument is based on the essential need to obtain more favourable consideration from the Treasury. Lawyers are the worst people to advocate this cause in Parliament or the country; they are always supposed to be "feathering their own nest." The best counsel to plead the case are "laymen." In addition to this reason, it is important that more should be known about the scheme's working in the country generally; in this and other ways laymen could perform useful service. It is proposed, as a start, that the Lord Chancellor's present Advisory Committee, which has worked so well for seven years, should be appointed *en bloc* on to the Scheme-making Committee.

PETER BENENSON

SINGING IN THE RAIN

OR SUR-TAX DIRECTIONS WITHOUT AN UMBRELLA

Introductory

IT has been said that the practice of banking consists of lending umbrellas when the weather is fine and asking for them back when it begins to rain, and it appears that Government policy in the matter of company distributions is founded upon the comparable principle of taking back the umbrella whilst warning its user that he must on no account get wet.

As is well known, sur-tax is payable only by individuals and not by companies, whilst profits tax is payable only by companies and not by individuals. Profits tax, however, was only invented, under the name of National Defence Contribution, in 1937, and fifteen years earlier, in the Finance Act, 1922, s. 21, it had been enacted that, in the case of certain classes of company, if it could be shown that a company had unreasonably withheld some part of its income from distribution, the whole of the company's income for the period in question could be charged with the same amount of sur-tax as it would have attracted had it been distributed by way of dividend to those entitled to it. These original provisions could not be called models of the draftsman's art and they were more or less elaborately amended by the Finance Acts, 1927, 1936 and 1939. The last of these introduced a new conception, dividing the companies within the sphere of the original enactment into what may be termed trading companies and investment companies and providing that, in the case of the latter, any income which had not been distributed would be charged with sur-tax whether it was or was not unreasonable to withhold its distribution. When profits tax, then called National Defence Contribution, first made its appearance the rates were comparatively low and no particular difficulty was found. In 1947 the Government was inveighing against excessive distributions of company profits, there was much talk of "dividend sprees," there were suggestions that it would be made illegal for a company to increase its dividends and the principle of the differential rate of profits tax was introduced. That principle was to charge profits tax at a high rate (now 30 per cent.) but to give a large rebate (now 27 per cent.) if any of the profits so chargeable were not

distributed, so that, in so far as a company and its members were content to allow the profits to remain in the company, profits tax was in effect payable only at the difference (now 3 per cent.). Furthermore, profits tax was not to be chargeable at all in so far as the profits of the period were charged with sur-tax under the earlier provisions.

This scheme of taxation was designed to support the Government's general financial policy by giving companies a strong incentive not to distribute their profits to their members and was quite impossible to reconcile with the scheme of the Finance Act, 1922, s. 21, which was designed to be a strong incentive to companies to distribute as much as possible of their profits to their members. Indeed, it succeeds admirably in that regard because if it be shown that in a given accounting period a company has unreasonably withheld some income from distribution the result is not to charge sur-tax upon the amount of income so unreasonably withheld but to charge it upon the whole undistributed income whether reasonably or unreasonably withheld. Thus, if a company having an income of £10,000 in a given period has every good reason to withhold £7,500 of that from distribution, limiting its dividends to £2,500, but in fact withholds £8,500 of it from distribution, limiting its dividends to £1,500, and it is found that that conduct is unreasonable, the result is not to charge with sur-tax £2,500, the sum which might reasonably have been distributed, but to charge the whole £10,000 with sur-tax whether it might reasonably have been distributed or not.

One way of disposing of this difficulty and disposing of it permanently would have been for the Government of the day to have proposed an amendment to the provisions of the Finance Act, 1922, enacting that sur-tax would be chargeable only upon that part of the company's income which had been unreasonably withheld and enacting that the exemption from profits tax should extend only to that part of the income. Looking ahead, it is interesting to see that the Royal Commission on the Taxation of Profits and Income in its Final Report (Cmd. 9474) presented in June, 1955, proposed on other grounds that the provisions of the Finance Act, 1922, should be so amended. However that may be, it would appear that the Government of the day was more interested in preventing any increase, reasonable or not, in company distributions and therefore successive Chancellors of the Exchequer on the 11th June, 1947, and 22nd July, 1948, announced that if a trading company which was trading before June, 1947, restricted its distribution to that adopted in the periods ending before June, 1947, no action would be taken under the Finance Act, 1922, s. 21, unless there had been "avoidance devices" of which the typical instance mentioned in the statement was the withdrawal of money from the company in the guise of capital. On 25th April, 1956, the then Chancellor of the Exchequer indicated that newer trading companies whose first accounting period ended after 31st May, 1947, whilst not within the ambit of the earlier statements, would be treated in a similar manner in that they might restrict their distribution to such rate as had been considered reasonable once the business had become established. The effect of these statements, the earlier of which became known as the "Chancellor's Umbrella," was that, as desired, companies did restrict their distribution and took care to indulge in no such avoidance devices as are mentioned in the statements.

On the 1st August, 1957, the present Chancellor of the Exchequer in terms commendably brief and commendably clear said that the earlier statements would have no application in regard to accounting periods ending on or after the 2nd August, 1957. Accordingly, things are now where they were in 1947, save only that the Government exhortations are not so much against distribution of profits as in favour of capital re-equipment and that the difference between the effective rates of profits tax on distributed and non-distributed profits is even wider than it was ten years ago. It is to be expected that action by the Revenue authorities under the Income Tax Act, 1952, s. 245 *et seq.* (which is a re-enactment of the Finance Act, 1922, s. 21), will be much more frequent than it has been in the past. How this reintroduction of this powerful incentive to companies to distribute their profits is to be reconciled with the present policy of restraining all inflationary tendencies has never been explained, but whatever the answer to that question may be the fact remains that the Chancellor has repossessed himself of his, or his predecessors', umbrella.

It is proposed here to examine some of the salient features of the law as they relate to trading companies, which are the only ones affected by the recent change. No attempt will be made to deal exhaustively with all the highly technical details.

Companies vulnerable to sur-tax directions

Not every company can be made liable to sur-tax upon its income. The provisions apply only to a company which is under the control of not more than five persons and which is not a subsidiary company or a company in which the public are substantially interested, but those familiar with our taxing statutes will not be surprised to know that those simple words are flanked with so many extensions and definitions and deeming provisions that their meaning is quite other than what it seems.

Before coming to the meaning of the word "control" and the circumstances in which control may be deemed to exist, it is first to be noticed that persons who are relatives of one another, persons who are nominees of any other person together with that other person, persons in partnership and persons interested in any shares or obligations of the company which are subject to any trust or are part of the estate of a deceased person are to be treated as though they were respectively a single person, and it is provided that for this purpose a "relative" means a husband, wife, sister, lineal descendant, brother or sister. This principle of composite persons can give rise to difficulties, but for present purposes it suffices to say that it is extremely difficult so to arrange the shareholding of a private company in which members of one or two families are interested so that the company is not under the control of not more than five persons. The best way of doing it is to have eleven unrelated persons, each holding one-eleventh of the issued capital, but this is not easy to arrange in practice.

When the members of the company have been as it were coalesced into composite persons by adding together all the husbands and wives, brothers and sisters, etc., the company is then, in general, within the provisions if any five persons can directly or indirectly control or acquire control over the company's affairs or possess or are entitled to acquire the greater part of the share capital of the company or would be entitled to more than one-half of the company's income if that income were fully distributed or, finally by a peculiar example of draftsmanship, if, assuming what one is setting out to prove—that the company is within the provisions—the income thereof could under those provisions be directed to five or fewer such composite persons.

If the company is so under the control of five or fewer persons, it remains to be considered whether it can be extracted from the ambit of the provisions by reason of its being a subsidiary company or by reason of its being a company in which the public are substantially interested. The former is not very easy because not only must the company be a subsidiary of a company not itself within the ambit of the provisions, but in addition it must not be possible to bring the company within the first test—control by five or fewer persons—without including amongst those five or fewer a company not itself subject to the provisions. All this is very difficult to achieve unless more than 50 per cent. of the share capital is held by a public company. But it is sometimes easier to show that the public are substantially interested. To do so it is necessary to demonstrate that not less than 25 per cent. of the ordinary shares carrying not less than 25 per cent. of the voting power have been allotted unconditionally to, or acquired unconditionally by, the public and are beneficially held by the public at the end of the relevant period and that the shares have in the course of such period been the subject of dealings on a stock exchange in the United Kingdom, and that such shares have at some time or another, within the period or not, been quoted in the official list of such a stock exchange. The principal conundrum about this provision is to determine who are, or what is, "the public." There are two reported decisions, that of the Court of Appeal in *Tatem Steam Navigation Company, Ltd.* v. *Inland Revenue Commissioners* [1941] 2 K.B. 194; 24 Tax Cas. 57 and that of the Judicial Committee in *Commissioners of Income Tax* v. *Bjordal* [1955] A.C. 309: whilst they show that "the public" is a rather wider conception than the Revenue Authorities might wish, they raise almost as many problems as they solve.

Procedure

Assuming that a company is vulnerable to direction, surtax is not, and cannot be, assessed automatically year by year. Liability only arises if and when the revenue authorities issue a direction and, except when the taxpayer has taken the initiative by submitting accounts under the Income Tax Act, 1952, s. 252, the first step is for the revenue authorities, acting under s. 250, *ibid.*, to require the company to furnish them with a statement of its actual income and its accounts for the relevant period and with a statement for the same period of the names and addresses and particulars of the interests of its members. The company may then do one of three things: it may file a statutory declaration pursuant to s. 251, *ibid.*, it may write to the revenue authorities in an attempt to persuade them to hold their hands, or it may do nothing and await developments.

The first alternative is a peculiar one whereby the directors of the company can submit a statutory declaration to be forwarded to the Board of Referees, who consider that statutory declaration together with any counter-statement which may be made by the revenue authorities but without the benefit, if benefit it be, of oral argument: the board then determine whether there is a *prima facie* case for the revenue authorities proceeding in the matter. Those who have any experience of petty sessions will know that there is a large difference between there being a *prima facie* case fit to go to assizes or quarter sessions and there being evidence upon which a conviction can be obtained when the case has gone there. The Board of Referees is not concerned at that stage to decide the question of reasonableness or unreasonableness: it is concerned only to say whether the facts are such that that question requires consideration. In these circumstances it is not surprising that it is most unusual for the Board of Referees to stop the matter at that stage, and whilst many people do submit such statutory declarations the present writer has never been able to see very much, if any, point in doing so.

The second, more useful, alternative is to put some of the contents of the statutory declaration into a letter accompanying the statements to be sent to the revenue authorities so that those authorities may have a better overall picture than they would gain from those statements alone. If those statements and accompanying letter show that there is no *prima facie* case for proceeding the revenue authorities will not wish to proceed: they do not wish to involve themselves in an appeal which they do not think that they can win. If, as is more usual, there is something to be said on both sides, the revenue authorities are usually prepared, before actually making the direction, to discuss the position with representatives of the company. Sometimes such discussion leads nowhere, sometimes it leads to the Commissioners dropping the matter entirely, and sometimes it leads to a compromise whereby the matter is dropped upon terms that the company will distribute some additional part of its income: very often the discussions end in a haggle about how much that should be. In embarking upon such a haggle it should be remembered that if a direction is made sur-tax is payable upon the whole of the income of the year but no profits tax is payable on that income: if additional amounts are distributed, sur-tax is payable only upon those amounts which are distributed, but profits tax is payable upon the whole income at the lower rate and upon the distributed part at the higher rate.

If the company does nothing it is presumably either because it knows there is no possible defence to a direction or because it is determined from the start to fight it on appeal.

If and when a direction is made the company may enter an appeal against it, which appeal is heard by the Special Commissioners, and it is now settled that on the hearing of such appeal the onus is on the revenue authorities to show that the company has unreasonably withheld a part of its income from distribution and those authorities cannot sit back and leave the company to establish affirmatively the reasonableness of what it has done. That being so, the revenue authorities have the right and duty to begin and, if the taxpayer calls evidence, to have the last word: frequently, however, when most of the evidence is in the hands of the taxpayer and not the revenue authorities, an agreement may be reached whereby the taxpayer opens and has the last word. The considerations bearing upon the main question of reasonableness or unreasonableness are discussed below, but, continuing with procedural matters, there is a provision that either party who is unsuccessful before the Special Commissioners may apply to have the whole matter re-heard before the Board of Referees. This hearing before the Board of Referees should not be confused with the procedure whereby a statutory declaration is placed before the Board of Referees. At this stage the Board does listen to oral argument and is concerned with the very question at issue—guilty or not guilty of unreasonableness—and not only with the existence of a *prima facie* case. There is an appeal by case stated from the Special Commissioners or Board of Referees to the High Court on points of law only.

The reasonableness of distributions

It has already been said that if and when there is an appeal against a direction the onus is upon the revenue authorities

affirmatively to show that the company has unreasonably withheld profits from distribution, and it is settled that the question which must be answered affirmatively in order to justify a direction is not "Could this company have reasonably made some distribution or some larger distribution?" but "Was it unreasonable for this company not to make any distribution or not to make some larger distribution?" Before discussing the various considerations which are to be taken into account, it is convenient to consider some situations which are the subject of special statutory provisions.

It is easily seen that a company might from its very inception so conduct its affairs that it could hardly ever be said to have been unreasonable in not distributing its profits by way of dividend. A striking example will be found where the proprietor of a business sells it to a company in which he is the principal shareholder. If he were to take the bulk of the purchase consideration in redeemable preference shares or in redeemable debentures, or if he merely left it outstanding on loan, the company could in the absence of any special provision and at all times until the whole of the moneys had been paid off, presumably out of profits which it earned, point to the existence of these liabilities and to the need to accumulate its profits and conserve its resources in order to meet them. The result, when these liabilities had eventually been discharged, would be that the profits which had been used to discharge them would have escaped surtax either in the ordinary way or by way of a direction under s. 245. Alternatively, and at any stage in the company's existence, redeemable debentures or redeemable preference shares might be issued to its members for less than full consideration similarly providing a reason or excuse for not distributing profits as they arise. It is, therefore, enacted in the Income Tax Act, 1952, s. 246, that any sum expended or applied or intended to be expended or applied in or towards paying for the original undertaking of the company or in or towards redeeming share or loan capital issued in connection with the acquisition of the original undertaking or issued for something less than full consideration is to be regarded as not having been expended upon meeting the current requirements of the company's business or in meeting any such other requirements as may be necessary or advisable for the maintenance and development of that business and as being available for distribution. There is an express proviso that, despite the fact that such money is to be so treated, the Special Commissioners must not uphold a direction unless they in addition positively find an unreasonable withholding by the company. The precise effect of this provision is still uncertain: the better view seems to be that one must add back any moneys so expended in assessing the liquidity of the company and then consider what other reasons there may be other than those connected with the acquisition or loans to justify the retention of those funds so notionally added back. But the revenue authorities sometimes contend that they have a wider effect which is, however, difficult to reconcile with the existence of the proviso.

Passing from these special cases, and remembering that they only apply to moneys expended in or towards payment for the original business undertaking or property of the company and not to moneys expended in payment for additions or extensions to that business undertaking or property, one returns to the general principles by which unreasonableness is to be judged. It is provided in s. 246 that the Special Commissioners must have regard not only to the current requirements of the company's business, but also to such other requirements as may be necessary or advisable for the maintenance or development of that business, and it is established by the authorities that the Special Commissioners may take into account any other relevant matters. Such matters must, however, be relevant to the company as a company and not to the personal preferences or financial position of its members. The manner in which the Commissioners, or it may be the Board of Referees, are to consider the problem was indicated in *A. & J. Mucklow, Ltd. (In Liquidation)* v. *Inland Revenue Commissioners* (1954), 35 Tax Cas. 251, by Harman, J., at p. 264, when he said that the Commissioners must seat themselves in the board room and consider the whole situation facing the directors at the relevant time.

In practice, one finds that much of the argument and discussion at an appeal centres round the company's liquid position and its plans, if any, for future development. Examining the matter in the most general way, it can be said that there is no limit to the amount of profit which a company may withhold from distribution in order to plough back into, or to extend, its business or undertaking. A company is in a really vulnerable state only when it has withheld profits from distribution without having ploughed them back into its undertaking or without having applied them in the development and extension of that undertaking or without having plans on foot to do so: in short, when the moneys withheld are in every sense spare in its coffers.

If a company has at the relevant time already expended the retained profits developing or enlarging its business by way of addition to its fixed assets, it follows that those moneys will already become permanently fixed in the business and will not be included among the liquid assets out of which the dividends are usually paid. If the development or expansion has not involved the acquisition of additional fixed assets but has rather taken the form of an increase in turnover calling for a higher level of trading stocks and greater working capital, the moneys will be represented among liquid assets in one form or another. Similarly, a retention of assets to meet anticipated capital expenditure will result in an inflated level of liquid assets in the meantime. Either of these latter cases, in addition of course to the hopeless case where the company has retained profits for no reason whatever save only that its shareholders did not want to pay sur-tax on them, are the typical situations in which a sur-tax direction may have to be fought on appeal.

It is usually necessary to start by ascertaining the company's net liquid assets as disclosed by the accounts: from that one may take some deduction for known contingent liabilities. A typical case of such a liability is taxation which will be payable in a future year, and will be computed by reference to the profits of the period under discussion, if Parliament should continue to impose income tax year by year. The revenue authorities have been known to contend in appeals against directions that it is not reasonable to reserve against this liability because it can be paid out of the next year's profits, but since the general consensus of opinion in the accounting profession is precisely to the contrary this contention is not now so often heard. When one has thus established the extent of the funds available for paying a dividend after providing for legitimate liabilities one must consider to what extent the company might reasonably deplete them: as already indicated this depends both upon its normal trading activities and upon its ambitions for future development, and as it is difficult to generalise, cases must be considered as they arise.

Consideration of normal trading activities will depend upon the rate of turnover of stock, the amount of credit taken by the company, and the amount of credit demanded by its customers: these in turn will depend upon the trade in question and the state of that trade. Cases have been known where there was a distinct sellers' market in the raw material and a distinct buyers' market in the finished product: if a situation of that sort is to be weathered the unfortunate company caught between the two will require a very large amount of working capital indeed. Similarly, seasonal fluctuations may have to be taken into account: there are companies whose annual level of trading stocks at the end of their accounting period is less than half the average level of those trading stocks halfway through the accounting period. All these things must be considered.

Similarly, the reasonableness of retaining profits to meet schemes of future capital development must depend upon the circumstances and upon the schemes. If the directors have firmly in mind a specific project of capital development which is appropriate to the circumstances of the company and are waiting only until they have saved up enough money to carry it out, or perhaps until the necessary licences or the necessary equipment and machinery are available, that will be a perfectly sound answer to the revenue authorities' allegations of unreasonableness, but the same cannot be said of some vague castle in the air. A company trading as a shopkeeper which is cramped for space and which knows that the lease of the next-door premises is expiring in four or five years' time might very reasonably save up in order to be in a position to acquire those premises to extend the business, but an ambition to found a second "Harrods" is a different matter.

In all cases it will be necessary to consider not only the financial position of the company in the relevant period, but also its financial record in the past—sometimes over twenty-five to thirty years, the general state of the trade in which it is engaged, whether the company's share of that trade is expanding or contracting, the opinions of its directors on the future of the trade generally and of the company's likely share in it and their plans for future capital expenditure if any there be. Only in the light of all these factors can the reasonableness or unreasonableness of the company's policy be judged.

G. B. G.

THE NEW POLYGAMY

A HUNDRED years ago divorce was a privilege of the very rich and to all intents and purposes was limited to male members of the aristocracy. There were on the average three divorces a year. In 1954 there were 28,027 decrees of divorce and nullity granted in England and Wales. Of this great army of divorced, about 70 per cent. remarry, and many divorce and remarry more than once. Polygamy, in series if not in synchrony, has become the practice of a significant proportion of the population. It is proposed to examine some of the more curious anomalies and changes which have occurred during the process of this staggering social evolution.

When a whole system of law—statutes, cases, practice directions and the whole bag of tricks—has grown up in less than a century, it is not really very surprising to find that it contains a few anomalies. The body of divorce law in this country, as we know it, was delivered after a prolonged and painful labour in 1857—a premature or an overdue birth?—from its shamefaced mother, the Ecclesiastical Jurisdiction, to lie muling and puking for many years in the arms of its *ad hoc* and rather reluctant nurse, the new Court for Divorce and Matrimonial Causes. Between 1857 and 1923 the growing child, untroubled by intimations of immortality, pursued a course of undiluted gynephobia: although a husband could divorce his wife for a single act of adultery, he could not himself be divorced unless he added to his adultery some enormity such as sodomy or slapping his wife's face. Since 1850 three Royal Commissions have covered acres of paper with miles of well-intentioned words on the divorce law, and there have been at least twelve Acts of Parliament and thousands of decisions; a few of the anomalies have been set to rights, but new ones have arisen and this branch of the law is probably subject to more rapid change than any other.

Motive in cruelty cases

Since divorce law in this country is based on the concept of a matrimonial offence, it follows that a party to a marriage will not be found guilty of cruelty unless his conduct is "aimed at" the other party: since the interference with status which follows on divorce is punitive and retributive rather than protective of the innocent spouse, the "guilty party" must be shown to have had *mens rea* and not merely to have been his or her unpleasant self. Thus however boorish and drunken a husband, however sluttish and frigid a wife, there can in theory be no relief where these are faults of personality, present from the start of the marriage which was for better or worse, for richer or poorer: there must be something which will satisfy the court that the conduct complained of was directed against the other party—see *White* v. *White* [1950] P. 39, *Horton* v. *Horton* [1940] P. 187, and *Kaslefsky* v. *Kaslefsky* [1951] P. 38. But this hard doctrine has been whittled down, until it is now little more than a fiction, by the application of the maxim that a person intends the natural and probable consequence of his acts: in *Lang* v. *Lang* [1955] A.C. 402, the Judicial Committee of the Privy Council held that where a man persistently struck his wife he was guilty of driving her out, even if he did in fact want her to stay, since he must have known that such conduct would make it impossible for her to do so; this decision has been applied in cruelty cases and has given the *coup de grace* to the "aimed at" basis of cruelty.

Acceptability of psychiatric evidence

Some of the worst forms of cruelty have effects on the injured spouse which cannot be established by simple visual evidence. These effects can only be assessed by someone trained in the understanding of the mind and the emotions. Further, such an expert can in most cases only base his opinion of the degree of injury to the psyche on the answers which he receives when questioning the patient; the bruises of the spirit cannot be seen with the naked eye, nor has science any instruments wherewith to measure the depth of the hurt. Opinion evidence given in such circumstances is clearly open to abuse and can only be accepted after careful scrutiny—the court must be absolutely satisfied, in the first place, that the expert is of the highest integrity—but it is difficult to see how such evidence could be rejected out of hand without causing grave injustice. After all, it is a tenet

of the law relating to cruelty that the test is largely a subjective one; conduct which would do irreparable harm to a sensitive young bride might be accepted with equanimity by a tougher woman who had been brought up to quite different standards of "the reasonable wear and tear of married life". The best example of how the subjective test operates is perhaps in cases of cruelty based on sexual perversions; as Lord Merriman, P., said in *Holborn* v. *Holborn* (1947), 63 T.L.R. 87: "No one can sit here as long as I have sat without realising that there is the greatest diversity of standards between one set of spouses and another as to what is or is not a normal standard of sexual intercourse . . . There are things strictly outside what may be called normal sexual intercourse which will be regarded by one wife (or by the husband, as the case may be) as so revolting as to be unmentionable, whereas other couples will regard them as nothing more than natural, normal love-making."

If psychiatric evidence is to be accepted at all, it seems inevitable that in some cases it will be nothing more than an expert opinion given after consideration of subjective symptoms. The anomalous position of a psychiatrist giving such evidence was demonstrated in May this year when Wallington, J., dismissed a petition on the grounds of cruelty where the corroborative evidence was of this nature because, he said, the psychiatrist had usurped the functions of the court by pre-judging the evidence as to fact since he had based his opinion on the answers given to him by the petitioner. The learned judge added some very hard words about the distinguished psychiatrist, Dr. Donald Blair: so hard that the medico-legal correspondent of the *British Medical Journal* (16th November, 1957) commented that "few lawyers would blame Dr. Blair if he refused ever to give expert evidence again." The decision of Wallington, J., has now been reversed by the Court of Appeal (*The Times*, 1st November, 1957), when it was pointed out that Dr. Blair gave perfectly proper expert evidence on the facts available to him and that he was entitled to take into account what he had been told by his patient; it was still a matter for the court to decide as to the truth of those facts.

Which judge?

Uniformity in the standards of proof required by judges and freedom from prejudice in tribunals are essential to the proper administration of any system of law. In divorce, unfortunately but perhaps understandably, there is such disparity in judicial attitudes that it is sometimes necessary in advising clients to modify the advice according to which judge may try the case: "There is an 85 per cent. chance of success here, unless you come before *X* or *Y*, in which case the chances are not higher than 20 per cent.; if you are unfortunate enough to draw *Z*, the chances will drop to nearer 10 per cent." This element of lottery makes the practice of divorce professionally exciting, certainly, but it can hardly be in the interests of justice. It must be emphasised that such disparity is only of importance in certain well defined types of case. Divorce judges are given wide discretion in some respects, and in a matter which goes so much to the root of the human dilemma it is natural enough that their personal prejudices and religious feelings should influence them in the exercise of this discretion. What is less understandable is the difference in the standard of proof required by the judges: this applies particularly to adultery and to those cases of desertion in which the petitioner must show that his own adultery did not influence the deserting spouse. This criticism is made not of the judges, who on the whole carry out their difficult and distasteful task with devotion, but of the system of law which allows for and encourages such disparity.

Who pays?

In the bad old days, when divorce was simply a question of presenting a Divorce Bill in Parliament, there was an officer of the House of Commons known as "The Ladies' Friend" whose duty it was to see that some provision was made by husbands for their divorced wives: wives hardly ever divorced their husbands then, of course. In these more enlightened times usually only the "guilty" husband pays, and pay he must to the tune of something like a third of the joint income of himself and his former wife, less any income which she may possess. The sum he will be ordered to pay is based on his ability to earn rather than his actual earnings: recently a man with a net annual income (for tax purposes) of £60 was ordered to pay his former wife £7 weekly, the Court of Appeal saying that ability could include ability to raise overdrafts and could be measured by current expenditure for non-business purposes (*J.* v. *J.* [1955] 2 All E.R. 617).

Millions of pounds yearly are being paid (or not being paid) under maintenance orders. Who really pays these sums? Who, in other words, is the ultimate loser? The answer is in many cases that old pack-horse, the taxpayer, in other words you and I. Sharing one another's burdens is an elevating principle in theory, but are you and I really desperately anxious to pay Mrs. Expense-Account's maintenance of £1,000 per annum so that Mr. Expense-Account can make an honest woman of Miss Lushly-Curved? For that is what we are doing: Mr. E.-A. certainly does not feel the loss of that £1,000 per annum because nearly all of it would have gone in sur-tax in any event, and his payment of maintenance simply depletes the Exchequer by that amount. In the case of the "lower income groups", a divorced man who remarries will probably be physically incapable of paying any worthwhile maintenance to his former wife and family: either he supports his first family and the second family go on National Assistance, or the first family must be subsidised by the State. In either case it is once more the taxpayer who pays the price of polygamy. Of course, there are many who fall into neither of these classes, many thousands of struggling professional and small business men who must stumble through life with the ghastly millstone of maintenance round their necks, the price they pay for their dash for freedom.

And here we find another anomaly: in assessing maintenance the court must have regard to the ability of the husband to earn, but not to the capacity of the wife. If in fact the wife has a regular trade or profession, that will be taken into account, but even if she is a strong and active young woman, she is not forced to go out to work in order to reduce her ex-husband's obligation to pay maintenance: see *Rose* v. *Rose* [1951] P. 29. On the face of it this is just—why should a woman be forced to change her whole way of life just because her husband has misbehaved?—but in fact it does not always operate justly. We all know that "guilt" is a relative term in divorce: many a man buys his freedom from a thoroughly unsatisfactory and blameworthy wife by committing a matrimonial offence and may thereby saddle himself for years to come with the support of a useless, idle woman who contributed more to the break-up of the marriage than he did, although she was not guilty of any technical offence. Furthermore the woman's life is soured and sterilised in the result: instead of facing the consequences of failure and sturdily building a new life, she is encouraged in self-pity and backward-looking idleness.

However, the unhappy husband in these circumstances has a final resort: he can refuse to pay and eventually go to prison, when all arrears of maintenance will be wiped out; see *R.* v. *Miskin Lower Justices; ex parte Young* [1953] 1 Q.B. 533. It is difficult to see who benefits from this classical example of retributive justice, and the Magistrates' Association have recommended that it should be abolished.

" The children the marriage of whose parents is the subject of the proceedings "

Until about two years ago the " children " referred to in s. 26 of the Matrimonial Causes Act, 1950, did not include illegitimate children of the parties who had not been legitimated by the subsequent marriage of their parents. Thus it followed that a woman who married the father of her illegitimate child, born while he or she was previously married to someone else, was unable to obtain either maintenance or custody for that child if she ever came to divorce its father; her only remedy would lie in a bastardy order. This anomaly was remedied by the majority judgment of the House of Lords in *Galloway* v. *Galloway* [1956] A.C. 299, when it was held that the phrase was wide enough to cover all the children of the parties. One result of this is that petitions under the new rules must be framed to include the rather cumbersome wording of this section when there are any children. But in curing one anomaly another may have been created. It appears that it is now possible for a putative father to deprive the mother of her illegitimate child of whom, under the general law, she is the sole guardian.

Judicial attitudes to custody and access

The common-law rights of the father of children were paramount: they were his property, his assets, in tort they were in the same position as his servants (he could, and still can, bring an action for *quod servitium amisit*), and a fortunate man was he whose quiver was full. The mother's rights were negligible, unless her child was illegitimate, and the courts would never have made any order in her favour until the enlightened legislation of the 1880's showed for the first time an appreciation of the child's rights in these matters. The Guardianship of Infants Act, 1886, laid down that the court might make such order as to the custody and access " as it may think fit, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father." Here was a revolution indeed: in the space of two years, married women had gained the right to hold separate property and, apparently, to have some say in the upbringing of their children! But, of course, it was not quite as simple as that: the common-law rights of the father still invested him with a moral advantage over the mother, and it was many years before the mother's rights became in fact as great as those of the father.

Certainly a guilty wife stood little chance of seeing, let alone being given the custody of, her infant children; in 1862 Sir Cresswell Cresswell laid down the rule which was followed almost without exception until 1910:—

> " It will probably have a salutary effect on the interests of public morality, that it should be known that a woman, if found guilty of adultery, will forfeit, as far as this court is concerned, all right to the custody of or access to her children."

Gradually this harsh judgment was modified and during the 1920's an occasional case is reported where access was allowed to a guilty wife. In 1948 the Court of Appeal propounded an idea of startling novelty: a woman who has once committed adultery will not necessarily do so again, and she may be a fit person to have care and control of her child in preference to the innocent father; see *Allen* v. *Allen* (1948), 64 T.L.R. 418, where the guilty wife was given the care and control of her child, although the custody remained in the father. The words of s. 1 of the Guardianship of Infants Act, 1925, which are stronger than those of the 1886 Act, are to-day followed in letter and spirit: the courts make every attempt to regard the welfare of the infant as the first and paramount consideration, even to the extent of giving the custody, or at any rate the care and control, to a guilty parent where this seems in the best interests of the child. Access, too, is rarely withheld merely because of past guilt: only where moral danger is likely from contact with the co-respondent or woman named, or where the character or conduct of a parent appears likely to cause harm, will either parent be prevented from seeing the child.

It is almost inconceivable that to-day a mother would be severed entirely from her child, although it does seem that a father is more likely to fail in an application for access if strenuously opposed: in *Murphy* v. *Murphy* (1956), 5 C.L. 431c (C.A.), the Court of Appeal upheld an order made by Collingwood, J., that a father should have no access whatsoever, because the mother (who appeared in person) satisfied him that visits to the father were likely to disturb the children. It is true that the father had been found guilty of cruelty to the mother, although not to the children, some years previously, but this decision shows how far the law has moved in the mother's favour since the common-law rule prevailed. The discretion has always been in the court, but that discretion operates very differently to-day even from ten years ago. The children are no longer used, at any event by the court, as a whip to castigate the guilty, as in the days of Sir Cresswell Cresswell, and the mother's rights probably carry greater weight to-day than do those of the father.

Damages against the co-respondent

Another great change which has taken place, almost unnoticed, has been the attitude of the courts to claims for damages against a co-respondent. These damages are meant to compensate an injured husband for his material loss, and perhaps for the blow to his pride, although this is by no means certain, yet to-day large sums are seldom awarded, and the courts do not appear to be very anxious to award damages at all. Presumably women are not worth less now than they were fifty years ago—many more add to their family income than they did then—yet awards for damages relative to the number of divorce petitions based on adultery must be greatly reduced both in size and number. Possibly the reason is a complex one based on the general reluctance to regard a woman as a chattel on whose head is set a price. One day perhaps equality of the sexes will be pushed to the point where damages are awarded against the woman named.

So the matrimonial law continues to change, by a shift of emphasis here and a major decision there, showing a degree of sensitivity to social attitudes which is not found in any other branch of the law. Even those whose experience only goes back for a decade have seen great changes; it is impossible to imagine what the picture will be in another hundred years.

MARGARET PUXON

Mr. Christopher Wesley Shimeld, solicitor, of Oldham, left £120,619.

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THE NEW DEAL FOR CRIME

UNDER the Tudors, the criminal law was an instrument of tyranny for a despotic monarchy. The attempt of the early Stuarts to use it in the same way led to the conflict with Parliament and the courts ending in their victory. Under the later Stuarts and the Hanoverians, whilst the parliamentarians consolidated the foundations of our constitutional law as we know it to-day, the judges were similarly left free to enunciate the leading principles of the criminal law.

What they produced was a penal system of great severity and rigidity, but which, by insisting upon the highest standards of proof by the prosecutor, provided a strong shield for the protection of the individual citizen against wrongful or reckless conviction and despoliation.

Since then our efforts have been largely devoted to mitigating the severities of the criminal law, and it is interesting to follow the course this process has taken since the beginning of the present century. Writing nearly a hundred years ago, Sir James Stephens, perhaps the best known criminal judge of the Victoria era, said, "Criminals should be hated and punishments inflicted upon them should be so contrived as to give expression to that hatred." Few of us would agree with these sentiments to-day. We do not now look upon the criminal as one of a class apart. "There, but for the grace of God, go I" probably more nearly expresses the modern attitude to criminals in general, and this is certainly reflected in the legislation of the last fifty years, which has seen the passing of a succession of Acts allowing the courts to deal leniently with all offenders whom it is thought might take advantage of a generous forbearance, and our experience has been that in most cases this forbearance is not abused.

This trend was finally crystallised in the Criminal Justice Act, 1948, which, after making provision for various forms of probation based on the experience of the preceding half century, introduced the innovation of allowing the courts of assize and quarter sessions to impose fines for offences for which it was doubtful whether they had this power. At the same time the Act strongly discouraged the use of imprisonment for offenders under twenty-one. In particular, the summary courts were forbidden to do so unless they had good reason for thinking there was no other appropriate means of punishment. In place of prison for these young delinquents, the Act set up attendance and detention centres.

On the other hand, for the comparatively small number of criminals upon whom, as experience showed by repeated convictions, leniency was wasted, the same Act allows the courts to deal with them in such a way as to discourage others from following their example by the imposition of lengthy terms of incarceration—Borstal for two or three years in the case of younger delinquents and long periods of corrective training and preventive detention for persistent old lags.

Undoubtedly what will be regarded as the most striking change in our criminal law during this time will be the abolition of capital punishment, except for a few rare offences, with the passing of the Homicide Act, 1957. This, however, was not such a drastic change as is sometimes thought. All through the last fifty years we have been gradually moving in this direction. The Infanticide Act, 1922, put an end to the tragic farce of a woman being solemnly sentenced to death for killing her newly born child when everyone knew the sentence would not be carried out; and of recent years many persons were convicted of manslaughter who at the beginning of the century would probably have been convicted and hanged for murder.

Public opinion is still very divided about the wisdom of this change and the Home Secretary is already being frequently asked to give comparative figures of the number of murders committed before and after the Act was passed. These seem to show some increase, but it is far too early to form an opinion yet. The probability is that our experience will be very similar to that of other countries where capital punishment has been abolished. It will make very little difference. In the great majority of cases people murder first and think of the consequences afterwards.

Those who sit daily in the criminal courts must often have felt that there were far worse miscreants brought before them than many of those charged with murder, and to reserve the death penalty for a man who perhaps, in a moment of temper, had dealt a fatal blow, when the next man who followed him into the dock may by planned and calculated frauds have brought ruin and misery to thousands and got away with a few years of imprisonment, was neither just nor equitable.

Sometimes it may be thought this trend towards toleration and leniency is going too far. One facet of this problem is posed fairly and squarely by the recommendation of the Wolfenden Committee to repeal in part the provisions of the law making homosexuality a punishable offence. Those in favour of repeal argue that it is not the function of the criminal law to interfere with the activities of adult citizens if they are doing no harm to others. Those against say that if homosexuality is tolerated, if it can be practised without fear of criminal prosecution, it will increase and must result in a grave diminution of the vitality of the State.

Whenever two men set up an establishment together it must follow that two women lose the chance of making a home and producing children. It may be said that such men would not be very satisfactory spouses, but as we all know, it is astonishing what women can do with the most unpromising husband material. Certainly, if we all became homosexual, then the race would come to an end. This may not be likely to happen, but there is no doubt there has been a great increase in homosexuality in the last quarter century. According to the criminal statistics, there were only 622 offences of homosexuality known to the police in 1931. By 1955 this had increased tenfold to 6,644. One of the functions of the criminal law in the past has been to help safeguard the vital interests of the State, if necessary, against the individual citizen. It may be that the penal sections against sodomy, unnatural vice and incest owe their presence in the criminal code to the same reason as do those against the offences of treason and sedition. It may be that the legislators who framed these sanctions against the extreme forms of vice felt instinctively that left unchecked they would have a most harmful effect upon the health and well-being of the community as a whole.

Finally a crumb of comfort for those who think the Welfare State is costing us too dear. One of the strange results of the advent of the Welfare State has been the almost total disappearance of the vagrant. Fifty years ago he provided a fair proportion of the charges for hearing at the larger summary courts. Matriculating as an Idle and Disorderly Person for begging or neglecting his family, he went on to take the intermediate degree of Rogue and Vagabond for

wandering abroad and deserting his wife and children. Finally he graduated into the hopelessness of an Incorrigible Rogue, sentenced out of hand from time to time to twelve months' imprisonment.

The impact of the Welfare State upon the great army of outcasts is phenomenal. In 1900 nearly 17,000 were convicted of begging; in 1955 only 600. In 1900 nearly 10,000 tramps were convicted of "wandering abroad"; in 1955 less than 600. Not so long ago nearly every magistrates' court in the larger towns could be sure that on Boxing Day there would be a charge against a refractory pauper who, with brazen-faced impudence, had made improper suggestions as to what should be done with the seasonable delicacies provided by the workhouse master for the celebration of the anniversary of the Nativity. Alas, alas, this colourful character has gone down before the irresistible advance of our social legislation. It is a solemn thought that had the Welfare State arrived but a few years earlier, one of the best loved poems in our language would never have been written.

Against this, on the credit side of the account, we must set the presumption that this great army of vagrants or their successors have now become integrated into the national economy, and instead of being a drain upon their fellow citizens, are now making their contribution to the general well-being.

F. T. G.

RIOT OF CHARITY

THEORETICALLY the world could get on very well indeed on duty, law, justice and technology, but only if it did not happen to be inhabited by human beings, for there is something in the human personality that is for ever reaching out beyond these towards love and mercy and charity and the intuitions of the poets. And this is the bane of all wise and enlightened and clear-headed rulers and legislators and, indeed, of all those persons for whom orderly behaviour is the supreme virtue, for love and mercy and charity and poetic intuition are imponderable and indefinable, so that of them, as of women, the wise and the enlightened and the clear headed are tempted to say, with understandable exasperation, that you cannot live with them and you cannot live without them. The most exasperating thing about them is that once you get them completely regulated, drilled and aligned, the power and the virtue go out of them. A municipal playground is one thing and a wild woodland is another, and if you try to extend the rules of the admirable municipal playground to the chaotic wild woodland you do not have a happier wild woodland but just another tame municipal park.

And that isn't the worst of it. Duty and love are both splendid but they are not the same thing, and love that has cooled and merged into mere duty insults the hearth it once warmed. So, too, everyone knows what a bad name charity got itself under the reasonable businesslike administration of men with a keen eye to reject the claims of any but the industrious and deserving poor; "as cold as charity" was a proverb in Victorian England.

The truth is that justice and charity are two utterly different things. To give to the deserving what they deserve is justice not charity, whether it is society that gives or the individual who personally discharges a part of society's obligation. Charity implies giving what cannot be demanded and therefore pure charity is not hag-ridden by the fear of giving to the undeserving.

A mental confusion of the ideas of justice and charity does not tend to produce a juster and more generous justice; it merely dilutes the spirit of charity, douses its fire. But in practice human life is rarely simple. At one extreme justice and charity, like love and duty, can live very happily together in individuals or groups of individuals, though the individual can always tell his just debts from his generous gestures, no matter how punctilious his justice or how instinctive his generosity. At the other extreme, those abstractions the State and other organs of Government must be just and cannot be charitable. Because they have nothing of their own and whatever they give to one set of individuals must be taken by force or threat of force from other individuals, they can only give deliberately and by rule to the deserving. Nor can they with prudence seem to extend the scope of that which can be demanded from them of right, since no one has any conscience about making extravagant demands on the Government.

It is in between the two extremes that there is a wide territory of good works established and permanently operating, small enough to allow scope for the impulses of personal charity but too large (since human imperfections are what they are) to dispense with an admixture of shrewdness with their sympathy. It is not the wild fire of charity of St. Francis of Assisi or St. Vincent de Paul or Octavia Hill. But neither is it the shilling in the slot gas fire of public "charity." It is a cheerful blaze in a well-tended grate by an open hearth.

Such a hearth fulfils an instinct very congenial to the English. How congenial it was you may read in the score of large volumes containing the reports of the commissioners appointed in the first half of the nineteenth century to inquire into the administration of charities throughout England and Wales. Chaotic and haphazard, these covered the whole face of England with a sort of jungle of benevolence. Tidy-minded and public-spirited men were becoming worried at the general disorderliness of it all and the great survey of charitable dispositions, parish by parish, which the labours of the commissioners produced does, indeed, reveal a very riot of well-doing and of kind intentions. Yet without that disorderly riot, century after century, there would have been no well-doing. Perfectly sensible men would have been perfectly selfish.

Open these volumes at random and you will find provisions for feeding the poor, for clothing the poor, for housing the poor, for warming the poor, for educating the poor, for providing for their spiritual welfare; every provision springing from a charitable impulse. There were little charities with incomes of less than £5 a year and big charities with incomes of over £2,000 a year. Some were well administered, others were not, yet even when abuses were detected the decorous official language of the commissioners is restrained.

Take the case of the school established in the parish of Llan Badrig in Anglesey under the will of Richard Gwynne in 1723: "There are at present only six children of both sexes in the school," says the report. "There is a strong feeling of dissatisfaction prevailing in the parish to the insufficiency of the master who is stated to be 80 years of age and almost blind and otherwise unfit for his office, nor is it calculated to diminish the dissatisfaction that he keeps a

public-house. These circumstances deter the parents from sending their children to the school . . . Whatever motives of compassion may have led to the nomination of this old man to be master, we cannot but observe upon the extreme impropriety of an appointment the inevitable consequence of which has been to deprive the poor children of that suitable education which was intended for them." Thus the report of the English commissioners. Their original investigations must have been closer to the language and experience of Dylan Thomas.

There was also something amiss with the Free Grammar School at Kidderminster and one suspects that Dickens could have added a few picturesque touches to the commissioners' report: "The small number of boys attending this school would naturally excite a suspicion that it was not carefully attended to by the master or by those whose duty it is to see that the masters discharge their duty efficiently. The undermaster, indeed, assigns as a reason that the inhabitants of Kidderminster have an objection to gratuitous education. We do not, however, think that this is proved. . . . We can have no doubt that the inefficiency of the school may in a great measure be attributed to the non-residence of the headmaster, who, although he may be regular in his attendance at the opening of the school every morning, is not likely to be considered so efficient as if resident on the spot. It is to be regretted that the trustees could ever have suffered the master to let his house and reside at a distance of nearly three miles from the school."

If one wishes Dickens had been a commissioner at Kidderminster, surely the description of the Godolphin charity for the Education of Orphan Young Gentlewomen is almost Thackeray: "The young ladies have been instructed by Miss Alford and Miss Emly in English, writing, arithmetic, French and needlework. Miss Alford added geography. Under Miss Alford all, or mostly all, learnt music, and many dancing . . . Housewifery has not been taught otherwise than this, that the children have been instructed to provide for themselves in the best manner and make the best appearance small means allow."

A somewhat sterner note is struck at the charity school at Stone in Worcestershire where the schoolmaster is to be "a sober, grave, orthodox member of the Church of England well skilled and careful to train [the pupils] up in good morality and orthodox Christianity and should carefully teach them to read the Holy Bible, to write a fair hand, to understand and practice arithmetic, to sing psalms and to say the Church catechism."

Bourne's charity school at Aylesbury provides clothing for its pupils and the list set out evokes a picture of a Kate Greenaway childhood: "The parents of the boys receive a shilling a week each; formerly they received one shilling and sixpence, but the funds will not now admit so great an expense. They are supplied annually with 1 suit of clothes, 2 shirts, 2 pair of stockings, 2 pair of shoes and a cap and also with books . . . The same regulations are observed in respect of the girls . . . They receive each annually, a stuff gown, a petticoat, apron, 2 shifts, 2 pair of stockings, 2 pair of shoes and a cap and are provided with books. All the children attend the parish church every Sunday."

Clothing charities were very common. In the case of Elizabeth Eustace's Charity at Princes Risborough each poor woman benefiting received five shillings' worth of material as follows: 2 ells of dowlas at 1s. 3d. an ell to make the body of the shift, 1 yard of Irish linen at 1s. 6d. a yard and a quarter of a yard of lawn at 4s. a yard for a pair of shift sleeves and a cap. At Wylye in Wiltshire the charity of Dame Elizabeth Mervyn dating from 1581 provided for the distribution of 50 ells of canvas at 12d. a yard to make shirts and smocks and 50 yards of narrow blue cloth at 20d. a yard to make coats and cassocks.

Then there are the food charities. Marshall's Charity at Shepton-on-Stour, for instance, under which meat and bread were distributed at Christmas; a cow was bought and killed for the purpose. Again, Philip Herbert of the Middle Temple left £300 in 1722 for the benefit of the poor of the parish of Kingsey in Buckinghamshire at Christmas. In the same parish the income of Anne Herbert's bequest of £100 was laid out in coals for the poor. "No distinction is made as to whether they attend the public worship in the parish church or not." Similarly Hartwell in Buckinghamshire benefited from the prolonged stay there of Louis XVIII, King of France, when he was a refugee during the Napoleonic wars. He left behind £100 which provided 4 cwt. of coal for poor families every winter. At Great Yarmouth Benjamin Jolly not only gave £100 for coal in December for "poor necessitous persons" but also £400 for the better support of forty poor widows.

Then all over the country there were the almshouses, mostly strictly regulated like the foundation of the Countess of Warwick at Chenies dating from 1603 requiring that none of the ten poor persons living there should "wander abroad to beg nor keep any tippling within the said house but that every one of them having ability of body should labour within door or without."

On four poor persons given accommodation at Langley Marsh a rather curious duty was imposed. There were a chapel and a library attached to the house, the library containing books of divinity for the use of the vicar and curate and all other ministers and preachers of God's Word. The books were kept locked in a chest and each of the four poor persons had a key and when any authorised person wanted to use them, "the said four poor persons or one of them should attend within the door of the library and not depart from thence during all the time any person should remain therein and should all the while keep the key of the said door fastened with a chain upon one of their girdles and should also take special care that no book be lent or purloined." The penalty for losing a key might in extreme cases lead to the expulsion of all the poor persons.

So it goes on, volume after volume, parish after parish, charity after charity, a wilderness of benefactions, of all shapes, sizes, dates and objects, including at Bromsgrove the provision of a public weighing machine. There was no settled mode of enforcing their proper administration. Even when an action was taken to the court "it frequently happens that the relator having commenced his proceedings from motives of private pique or under some temporary local excitement, becomes tired of the suit and the interests of the charity are sacrificed by a compromise or in many cases given up altogether in consideration of securing costs."

Consequently in 1849 a Royal Commission recommended the establishment of a permanent board of commissioners, with extensive powers to check abuses in administration. The result was the creation of the Charity Commission by the Charitable Trusts Act, 1853, so to canalise the generous impulses of the past as to irrigate the present, when otherwise human negligence would have allowed all to evaporate leaving only an arid desert. It is, of course, sad that such control is needed at all but the process of canalisation does not dry up the sources of charity. The heavens still open. *Rorate coeli desuper!*

RICHARD ROE

RELIEF FROM RATES OF CHARITABLE AND SIMILAR ORGANISATIONS

THE partial relief from rates conferred on charitable and similar organisations by s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, came into operation on the 1st April, 1956, and cases on the effect of the section began to come before quarter sessions (appeal against the rate) and occasionally before petty sessions (resisting applications for the issue of distress warrants) during the second half of 1956. During 1957 a large measure of interpretation has been given to the section, including several judgments in the High Court and the Court of Appeal.

Under s. 8 (2) rates chargeable in 1956–57 in respect of a hereditament occupied for the purposes of an organisation as defined in s. 8 (1) are limited to the amount of rates paid by the organisation in 1955–56 (with adjustments for periods of part occupation, etc.) and in subsequent years a proportionate reduction of rates is to be made. Under s. 8 (1) the relief applies to :

"(*a*) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare ;

"(*b*) any hereditament held upon trust for use as an almshouse ;

"(*c*) any hereditament consisting of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games or of open-air athletic sports) occupied for the purposes of a club, society or other organisation which is not established or conducted for profit and does not (except on special occasions) make any charge for the admission of spectators to the playing field."

Established or conducted for profit

Being established or conducted for profit was early the subject of conflicting decisions by different quarter sessions. The initial trend was rather in favour of the view that the actual making of a profit on certain activities constituted being conducted for profit, as distinguished from being established for profit. A late example of this class of case was *Loyal Duke of York Lodge, Independent Order of Odd Fellows, Manchester Unity Friendly Society* v. *Leatherhead Urban District Council* (1957), 50 R. & I.T. 61, Q.S. There the friendly society derived rents from its properties and interest from mortgages and other investments.

In *Ladbrook Park Golf Club, Ltd.* v. *Stratford-on-Avon Rural District Council* (1957), 50 R. & I.T. 91, Q.S., the rating authority sought to exclude a golf club on the ground that it was conducted for profit by reason of its earnings on catering and the bar and of green fees paid by non-members. It was held that the club was not conducted for profit since these fees were incidental to the purposes of a golf club for which it was established. Sir Donald Finnemore, one of the judges of the High Court, was chairman of the court, and delivered the judgment. This decision was followed in *Renishaw Park Golf Club* v. *Chesterfield Rural District Council* (1957), 50 R. & I.T. 267, where the golf club's revenue included, besides green fees and bar profits, donations, income from letting grazing rights, raffles and sweepstakes, dinners and dances. It made no difference that the golf club was a limited company without any prohibition in its constitution on the payment of dividends (it had paid none) (*Mid-Kent Golf Club, Ltd.* v. *Gravesend Borough Council* (1957), 50 R. & I.T. 613). A similar conclusion was reached by Mr. W. A. L. Raeburn, Q.C., the learned Recorder of West Ham, in *Guinness Trust* (*London Fund*) v. *West Ham County Borough Council* (1957), 50 R. & I.T. 465, in holding that a trust was not established or conducted for profit, on the ground that the accumulation of annual gains increasing the trust fund from £200,000 to £1½m. over a period was incidental to the charitable object of providing houses for the poorer classes. Mr. Raeburn made the closest analysis of the law on being established for profit appearing in any judgment.

Mr. Raeburn also held that it was unnecessary for an organisation to be both not established and not conducted for profit. Compliance with either requirement would suffice.

In *Independent Order of Odd Fellows, Manchester Unity Friendly Society* v. *Manchester City Council* (1957), 50 R. & I.T. 59, the friendly society employed its funds surplus to immediate requirements in order to maintain itself on a sound actuarial basis, and accumulated moneys over the years by additions and by judicious investments. Mr. Commissioner Laski, in the Crown Court, Manchester, held that the proceeds were not a profit or profits accruing from an organisation conducted for profit but arose from powers of investment ancillary to the objects of the society. He relied on the cases of *Re Bristol Athenæum* (1889), 43 Ch.D. 236 ; *R.* v. *Whitmarsh* (1850), 15 Q.B. 600 ; *Bear* v. *Bromley* (1852), 18 Q.B. 271 ; and *Moore* v. *Rawlings* (1859), 6 C.B. (N.S.) 289, decided on the meaning of "established for any purpose of profit" in the Joint Stock Companies Act, 1844 (all of which had been reviewed at length at 100 SOL. J. 886, at p. 887). He held that profit connoted trading and was the converse of loss.

The view that a friendly society was established or conducted for profit did not prevail in either quarter sessions or the divisional court in *Trustees of National Deposit Friendly Society* v. *Skegness Urban District Council* (1956), 49 R. & I.T. 795 ; (1957), 50 R. & I.T. 75 and 574 (it was not the subject of a decision in the divisional court). In the Court of Appeal it was dismissed somewhat summarily. Delivering the judgment of the court, Parker, L.J., said (at p. 575) : "From time to time, when those investments are sold, profits are made and the income and rents obtained are also in the nature of profits. The organisation accordingly does earn profits from which the members benefit, but that as it seems to us is a very different thing from being established or conducted for profit. In our judgment the earning of profits is purely incidental, and it cannot be said that the organisation is established or conducted for profit. It carries on no 'business' for the purpose of earning profits, cf. *R.* v. *Whitmarsh* (1850), 15 Q.B. 600. The society accordingly complies with the first condition."

Earlier decisions are therefore of value rather as illustrations of the application of this rule than as authorities themselves. But two cases at quarter sessions decided the other way may still be good law.

Two organisations which were limited companies and whose objects included "to carry on the business of caterers,

refreshment contractors " and other businesses and " to amalgamate or enter into partnership, profit-sharing or joint adventure with " other similar societies respectively were refused relief by quarter sessions as being established and conducted for profit in the first case and established for profit in the second (*Crosby Hall Association, Ltd.* v. *Chelsea Metropolitan Borough Council*; *British Federation of University Women, Ltd.* v. *Chelsea Metropolitan Borough Council* (1957), 50 R. & I.T. 380, Q.S.).

Construction of objects

The construction of the parts of s. 8 (1) (*a*) relating to objects has been the most prolific in litigation. As s. 8 is an exemption from rates at the expense of the general body of ratepayers, the words "or . . . otherwise" in the expression "or are otherwise concerned with the advancement of religion," etc., must be given a restricted meaning in case of doubt (*Trustees of National Deposit Friendly Society* v. *Skegness Urban District Council* (1957), 50 R. & I.T. 574, at p. 575).

Where an organisation has a written constitution it is to that constitution alone that the court should normally resort in order to ascertain its objects for the purposes of s. 8 of the 1955 Act (*Berry* v. *St. Marylebone Metropolitan Borough Council* (1957), *The Times*, 27th November,). But what the organisation did as evidenced in documents was looked at where there were no constitutional objects (*United Grand Lodge of England* v. *Holborn Metropolitan Borough Council* (1957), 50 R. & I.T. 132, 709). Where there are several objects, how are the main objects to be picked out? In *Chartered Insurance Institute* v. *Corporation of London* (1957), 50 R. & I.T. 448, Lord Goddard, C.J., and Byrne, J., looked at the constitution and held that the first of over a dozen objects was the main object. But Devlin, J., said that in determining the main objects one must look at what the institute achieved or attempted, which was a question of fact, and there was ample evidence to support the finding of quarter sessions against the relief, and this was apparently approved by the Court of Appeal in *Berry* v. *St. Marylebone Metropolitan Borough Council, supra.*

Every main object must be within the section. If any one of the main objects is not so within, the organisation will not be entitled to the relief (*Berry* v. *St. Marylebone Metropolitan Borough Council* (1957), 50 R. & I.T. 146; *The Times*, 27th November, 1957, C.A.). It was argued unsuccessfully in the Chancery Division in the same case ((1957), 50 R. & I.T. 146) that "each object need not be wholly concerned with religion or education or social welfare." Wynn Parry, J., said (at p. 147): " I cannot accept that argument because it introduces such an element of uncertainty as would make the provision in the 1955 Act quite unworkable. What test could be devised to say when a degree had been reached beyond which it would not be proper to allow an applicant the benefit of the section?" He held that the Theosophical Society in Great Britain was not within s. 8 (1) because its first object was not wholly concerned with the advancement of social welfare. This decision was affirmed by the Court of Appeal.

It has been said, however, that in determining whether the main objects of an organisation are within s. 8 (1) (*a*) of the 1955 Act, subsidiary objects may be disregarded (and it would seem that " subsidiary " must be distinguished from " incidental " or " ancillary " objects, which properly are not objects at all but powers for the furtherance of the true objects). It was said at the same time that it was not essential that the organisation should be formed ostensibly for the purpose of social welfare, but that it was sufficient if it was formed with objects the result of which was the advancement of social welfare (in that case) (*General Nursing Council for England and Wales* v. *St. Marylebone Metropolitan Borough Council* (1957), 50 R. & I.T. 446, *per* Danckwerts, J.). This decision was reversed in the Court of Appeal, but delivering the same court's judgment in *Berry* v. *St. Marylebone Metropolitan Borough Council, supra*, which was given on the same day, Romer, L.J., said: " Nor did the court, in our judgment, when referring to ' the provision of benefits which tends directly to improve the health or conditions of life of individuals ' mean that the provision of benefits which tended indirectly to produce these results cannot qualify under the section; for example, it might well be that an organisation the main object of which was concerned with the free training of girls who desired to take up nursing or midwifery as a profession would qualify notwithstanding that there was no direct benefit to society during their period of training."

The words " concerned with the advancement of " were construed by the Court of Appeal in *Trustees of National Deposit Friendly Society* v. *Skegness Urban District Council* (1957), 50 R. & I.T. 574, as meaning concerned with the advancement of religion, etc., as an end in itself and for its own sake and not merely incidentally to some other purpose. A friendly society which provided benefits for members on an actuarial basis was concerned with the benefits of members and only incidentally with the social welfare which conferring those benefits constituted and so was not within the section. In *General Nursing Council for England and Wales* v. *St. Marylebone Metropolitan Borough Council* (1957), *The Times*, 27th November, Lord Evershed, M.R., delivering the judgment of the court, said of the words " concerned with ": " It is not sufficient if the main objects are somehow or other related to, in some sense connected or ' mixed up ' with the advancement of social welfare. In our judgment, the advancement of social welfare (in this case) or of religion or education or of all or some of these activities (in other cases) must be ' the concern of ' the main objects, in other words it must . . . be established that the main objects . . . are directed to the advancement of social welfare . . ."

An organisation may fail because its objects have a dual purpose, particularly, e.g., the purpose of a profession. Whether an organisation's main objects are furthering the professional interests of members or advancing religion, education or social welfare has been involved previously in other connections particularly in relation to scientific societies exempt from rating under the Scientific Societies Act, 1843, and to charities especially in connection with their exemption from income tax. It arose in two cases under the 1955 Act. In *Chartered Insurance Institute* v. *Corporation of London* (1957), 50 R. & I.T. 448, the institute's first object was: " To provide and maintain a central organisation for the promotion of efficiency, progress and general development among persons engaged or employed in insurance, whether members of the institute or not, with a view not only to their own advantage but to rendering the conduct of such business more effective, safe and scientific, and securing and justifying the confidence of the public and employers by reliable tests " of such persons. It was held by the Queen's Bench Divisional Court that the object was to benefit the profession of insurance, to which the institute's examinations and lectures were incidental, and not to advance education. Perhaps the words " not only to their own advantage " were very material ones in this connection.

In *General Nursing Council for England and Wales* v. *St. Marylebone Metropolitan Borough Council* (1957), 50

R. & I.T. 446, Danckwerts, J., held that the council's main objects were concerned with the advancement of social welfare, basing his decision on the statutory duty of the council (set up by statute) to maintain a register of nurses, which was intended, not to raise the professional status of nurses, but to ensure that the public had only competent nurses. But the Court of Appeal took a different view. The court did not accept the view that an organisation " established for benefiting the public " and regulated by statute was necessarily one whose main objects were concerned with social welfare, otherwise every statutory or other scheme for regulating any professional body would qualify. Moreover, though provision for the health of individual members of the community was part of the Welfare State and the provision of nurses an essential part of every health service, the work of nurses was not exclusively social welfare work, e.g., one engaged to tend to the medical requirements of a private person of means.

Religion and education

Organisations claiming that their objects were concerned with the advancement of religion have been comparatively few in number. In *United Grand Lodge of England* v. *Holborn Metropolitan Borough Council* (1957), 50 R. & I.T. 132, 709, it was sought to show that the Grand Lodge which was the governing body was such an organisation. London Quarter Sessions rejected the claim on the ground that the main objects of the Grand Lodge were the co-ordination and administration of freemasonry. On appeal, the High Court held that this decision was clearly not supportable, since such co-ordination and administration was merely one of the ways of promoting freemasonry, which was the object of the lodge. However, it went on to hold that the main objects of the lodge were not concerned with the advancement of religion, because that meant promoting it in pastoral and missionary ways by positive steps to sustain and increase religious belief, and not merely by example. The lodge therefore did not secure relief. This case was approved and applied by the Court of Appeal in *Berry* v. *St. Marylebone Metropolitan Borough Council, supra.* Reading the judgment of the court, Romer, L.J., said: " The teaching of the fatherhood of God and of the corresponding brotherhood of humanity without distinction of creed appears to us to be at best the teaching of a doctrine which is of a philosophical or metaphysical conception rather than the advancement of religion." The object rejected as falling outside the advancement of religion was: " To form a nucleus of the universal brotherhood of man, without distinction of race, creed, sex, caste or colour."

In the principal case concerned with the advancement of education, *Chartered Insurance Institute* v. *Corporation of London* (1957), 50 R. & I.T. 448, Lord Goddard, C.J., and Byrne, J., held that the main object of the institute was to benefit the profession of insurance. But Devlin, J., looking at the activities of the institute (80 per cent. education), held that the advancement of education meant education for the purpose of education and not for professional advantage, and his judgment was cited with approval by the Court of Appeal in *Berry* v. *St. Marylebone Metropolitan Borough Council, supra.* Some day it may be necessary to reconcile this view with the House of Lords decision that the Royal College of Surgeons was instituted for the charitable purposes of science and education exclusively. In *Berry*'s case it was held that the teaching of the theosophical doctrine of the society's first object was not education within the meaning of s. 8 (1) (*a*).

Social welfare

No general attempt has been made to define " the advancement of social welfare " and, judges have repeatedly disclaimed any intention of defining it (see, e.g., Lynskey, J., in *National Deposit Friendly Society* v. *Skegness Urban District Council* (1957), 50 R. & I.T. 75, at p. 77, but most judgments since have followed his example). Nevertheless, important *dicta* have emerged in several judgments. In *Berry* v. *St. Marylebone Metropolitan Borough Council* (1957), 50 R. & I.T. 146, at p. 147, Wynn Parry, J., adopted the definition of counsel for the rating authority, " the provison of benefits or facilities which tend directly to improve the health and condition of life of the class of persons concerned." But he had already qualified that by saying that : " I am inclined to agree with counsel for the defendants that one must discover in the operation of the undertaking some direct impact on the proposed beneficiary, his example being a social centre established in Liverpool with a view to encouraging better relations among the various races which are to be found from time to time in that great port." Therefore, " to form a nucleus of the universal brotherhood of humanity without distinction of race, creed, sex, caste or colour" was not the advancement of social welfare. This was subsequently approved in the Court of Appeal (26th November, 1957), on the ground also given by Wynn Parry, J., that the object was much too wide.

In *Derbyshire Miners' Welfare Committee* v. *Skegness Urban District Council* (1957), 50 R. & I.T. 329, Donovan, J., said (at p. 331) : " To provide holidays in a seaside camp at cost, arrangements being made to provide varied and healthy recreation in the camp so that people do not walk aimlessly up and down the parade and have nothing like the same temptation to spend a lot of time in drinking, and where, in addition, mothers can leave their children properly looked after during the day and thus get some much-needed relaxation themselves, all this to my mind is clearly the advancement of social welfare ; and I did not understand counsel for the respondent rating authority to contend to the contrary." On appeal (*The Times*, 27th November) the Court of Appeal rather summarily dismissed a contention of the rating authority that the provision of benefits was not the advancement of social welfare which connoted rather an element of propaganda. It held that the holiday camp there provided by its very existence advanced social welfare by improving the lot of those entitled to take advantage of it, since it was an amenity as distinct from a tradesman's commodity. Ormerod, L.J., said in the judgment of the court ((1957), *The Times*, 27th November) : " It can hardly be denied that a holiday camp such as this tends to promote the happiness and general well-being of those entitled to make use of it." And he cited the definition of social welfare activities in the Miners' Welfare Act, 1952, in support of this view.

In *Trustees of National Deposit Friendly Society* v. *Skegness Urban District Council* (1957), 50 R. & I.T. 574, Parker, L.J., reading the judgment of the court, defined social welfare as follows (p. 575) : " Unless, therefore, some restriction can be implied from the context, we should have thought that the provision of benefits which tends directly to improve the health or condition of life of individuals comes *prima facie* within the expression." (The court deduced a restriction on the application of the expression from the words " concerned with ".) This meaning was enlarged by the Court of Appeal in *Berry* v. *St. Marylebone Metropolitan Borough Council* (1957), *The Times*, 27th November, where it was said that social welfare did not exclude well-being in a spiritual or emotional

sense, such as happiness or ethical behaviour. But a more restricted meaning was given to the expression in *General Nursing Council for England and Wales* v. *St. Marylebone Metropolitan Borough Council* (1957), *The Times*, 27th November, however. Lord Evershed, M.R., reading the judgment of the court said: " If we can add anything to illustrate the limitation which we think should in this context be put on social welfare, it would be that the phrase involves at any rate the conception of what used to be called ' good works ' ; the notion of things that, as a matter of social obligation, ought to be done for the benefit of those in the community whose living conditions in those respects are inadequate." He distinguished social welfare from the expression social well-being previously widely construed in the House of Lords.

Two of the main issues in connection with the meaning of social welfare have been (*a*) how far social welfare connotes a measure of benevolence and (*b*) benefit to a substantial section of the community, and these have been fought out largely by friendly societies. The general trend of decisions at quarter sessions was from the first rather against friendly societies being within s. 8 of the Act. An old decision had made it clear that they were not charities, and quarter sessions generally, though not universally, held that they were not organisations concerned with the advancement of social welfare (besides being established or conducted for profit according to some decisions). A fairly late decision to this effect, not carried further in this instance, was *Loyal Duke of York Lodge, Independent Order of Odd Fellows, Manchester Unity Friendly Society* v. *Leatherhead Urban District Council* (1957), 50 R. & I.T. 61, in which Surrey Quarter Sessions rejected the claim (on both grounds). The grounds of the decision that the society was not concerned with social welfare were that social welfare meant the " welfare of society in general and not the benefit of the members of the society itself." A reflection of this was to appear in later decisions of the superior courts.

The basis of the decision of quarter sessions in *Trustees of National Deposit Friendly Society* v. *Skegness Urban District Council* (1956), 49 R. & I.T. 795 ; (1950), 50 R. & I.T. 75 and 574, was that its main objects " were not concerned with the advancement of social welfare, being concerned only with the provision of benefits for its own members." Lord Goddard, C.J., in the divisional court, said (at p. 76) : " I think that is one reason why one can say it is not concerned with social welfare, that it is confined to paying members." Lynskey, J., said (*ibid.*) : " Coming as they do after the words ' are charitable or are otherwise concerned,' it rather looks as if one has to give some eleemosynary effect to the words ' social welfare,' and if a body only provides benefits to subscribers who pay for them and does it apparently according to its rules on an actuarial basis it cannot be said for one moment that its main purpose is of any eleemosynary effect for the purpose of the business it is carrying on."

In reading the judgment of the Court of Appeal, Parker, L.J., analysed the contention of the rating authority that the objects " must be restricted to objects in which an eleemosynary element is present and which are for the benefit of the community or a section of the community in the sense in which charitable objects must be . . . In our judgment, however, it is impossible to give the objects this restricted meaning . . . Two of the objects, the advancement of religion and the advancement of education, are themselves charitable objects, and if they are to have any extended meaning they must, we think, be read as not being restricted to cases which are for the benefit of the community or a section of the community."

Much the same view had been expressed by Wynn Parry, J., in *Berry* v. *St. Marylebone Metropolitan Borough Council* (1957), 50 R. & I.T. 146. He said (at p. 147) : " As counsel for the defendants pointed out, at first sight it is somewhat curious that, after the first class of objects mentioned in s. 8 (1) (*a*), viz., charitable, there are repeated two of the subjects of good charitable objects, viz., religion and education. But I think there is good ground for agreeing with his suggestion that they were probably included in order that the benefit of the section might enure to bodies which, though concerned with religion or education, did not qualify as charities or charitable bodies within the legal meaning of charity because they were of a private nature."

In the *National Deposit Friendly Society* case, Parker, L.J., went on to find a limiting factor in the use of the words " concerned with " before " social welfare." He said (at p. 576) : " Are then the objects of the organisation in any particular case concerned with the advancement of social welfare? An organisation may in fact advance social welfare in the sense of affording benefits to its members, but nevertheless not have as its object the advancement of social welfare as an end in itself or for its own sake. On the other hand, the fact that an organisation affords benefits to its members would not necessarily prevent its object being . . . advancement of social welfare . . . It is, we think, in considering this question that the persons to be benefited and the source of the benefits become pertinent considerations. Where the benefits are confined to the members, and where these benefits are derived entirely from their own contributions, it may well be difficult to say that the object is the advancement of social welfare for its own sake, even though the benefits themselves may advance the well-being of the individual members." He added in deciding the particular case that benefits were derived exclusively from members' contributions on an actuarial basis and default in payment of those contributions disentitled a member to benefits.

The essence of this decision would seem to be that the main objects of a society will be concerned with the advancement of social welfare if social welfare is the object as an end in itself and for its own sake, notwithstanding that members only are benefited ; but that they will not be concerned with the advancement of social welfare if their real end is the benefiting of members, although that benefiting is, in fact, incidentally the advancement of social welfare. Being " concerned with " something does not bring " in something which is incidental." This distinction is no doubt a perfectly valid one, but its application is certainly fraught with difficulties. Thus, it is not easy to find a criterion which will provide a ready distinction in all cases. In the case of the National Deposit Friendly Society itself, the objects were to provide particular classes of benefit to members, which were of the nature of social welfare. They failed to be concerned with the advancement of social welfare, not because they were confined to members, but because, being confined to members, they were derived from members' own contributions, were provided to members on an actuarial basis and ceased to be provided on default in payment of contributions. The first and the last factors are normal elements in organisations other than charitable bodies. The second may, therefore, be the cardinal one. But apparently the inference drawn from the presence of all three was that the society was concerned with the interests of members rather than the advancement of social welfare as an end in itself.

Perhaps the true inference was that the society was concerned with social welfare as a matter of business, though the word " business " is not used in this connection in the Court of Appeal's judgment, and elsewhere it states that the society " carries on no ' business ' for the purpose of earning profits." However, this reliance on business has been repeated in the divisional court and referred to in the Court of Appeal since.

The difficulties implicit in the *National Deposit Friendly Society* decision are shown by two subsequent cases in which it was sought to be relied on and distinguished respectively, both unsuccessfully. *Derbyshire Miners' Welfare Committee* v. *Skegness Urban District Council* (1956), 49 R. & I.T. 778; (1957) 50 R. & I.T. 329, and (1957), *The Times*, 27th November, was concerned directly with the question of benevolence and confining benefits to contributors and with the nature of the main object of the organisation. The object of a trust was to permit demised premises to be used as a holiday centre and a recreation and pleasure ground for the benefit of coal-miners employed by collieries in the Derbyshire district and their dependants and invitees. The trustees' funds for providing the camp came from statutory compulsory contributions from the mining industry, and the facilities were provided at cost to those using them. Quarter sessions had refused the benefit of s. 8 relief. The Queen's Bench Divisional Court held that the trustees were entitled to it.

Donovan, J., in whose judgment the other members of the court concurred, said counsel's argument was (at p. 331) : " If the main object of the organisation is business and not the advancement of social welfare, then it is not within the section, albeit that social welfare might follow from the operations of business. For myself I do not know that I should quarrel with that assertion." He would not disagree that the main objects of the organisation must be " benevolently concerned with the advancement of " social welfare " if ' benevolently ' is used in contrast to ' as a matter of business,' because I think that is inherent in the decision of this court in the *National Deposit Friendly Society* case. But in the present case I do not think that this camp is provided as a matter of business. I think there is certainly some benevolence about it, seeing that the beneficiaries did not provide the funds themselves which were necessary to establish the camp, that they enjoy a holiday at no more than cost and that the trustees who run the camp for them pay a rate for the premises which, apparently, is far below the rack-rent." On the question of the beneficiaries being of too limited a class because the nexus between them was that of a common employer held not to be wide enough by the House of Lords in the case of charities, accepting that social welfare connoted a benefit to society or a substantial part of it, he said (at p. 332) : " I think the coal miners of Derbyshire, their dependants and their invitees, if they are the only beneficiaries of this scheme, do constitute a sufficiently large and important section of the community for the present purpose."

This decision was given before the judgment of the Court of Appeal in the *National Deposit Friendly Society* case, and the distinction between business and social welfare had, therefore, already been drawn by the divisional court here as well as in that case before that judgment. On the other hand, the reference to a substantial section of the community might seem to have been unnecessary had that judgment already been given. However, the decision was affirmed in the Court of Appeal on similar grounds.

In the Court of Appeal the rating authority contended first that the funds for the camp, so far as not provided by the beneficiaries, were provided by a statutory levy and not by voluntary contributions, and that the carrying on of the camp was a business of which the outgoings were paid to an overwhelming extent by the beneficiaries. The case therefore fell within the principle laid down in the *National Deposit Friendly Society* judgment. But the Court of Appeal held that the case was distinguishable because : " On the one hand, there is a friendly society carrying on what is in effect the business of a mutual insurance company. On the other hand, there is a committee carrying on a holiday camp on premises which have been provided otherwise than by those entitled to benefit at a cost of £35,000, so that holidays may be enjoyed at a cost not greater than that of running the camp and providing for the upkeep."

The Court of Appeal also affirmed in particular the decision of the Queen's Bench Divisional Court that the miners of South Derbyshire formed a sufficiently substantial section of the community, " measured by common-sense standards," to fulfil the implication of the word " social " in " social welfare." The question of benefits being confined to members, or in this case participants contributing, is thus revived, although it was apparently buried by the court in the *National Deposit Friendly Society* case.

In *Independent Order of Odd Fellows, Manchester Unity Friendly Society* v. *Manchester City Council* (1950), 50 R. & I.T. 59, Mr. Commissioner Laski, in the Crown Court, Manchester, had held that a friendly society was concerned with the advancement of social welfare. He gave to the expression the meaning assigned to it in everyday parlance and not a technical meaning parallel to that applied to " charity," and he held that it applied to a friendly society notwithstanding restriction of benefit to members. The appeal against this decision came before the Queen's Bench Divisional Court after the decision of the Court of Appeal in the *National Deposit Friendly Society* case. It was sought to distinguish that case on six grounds : that three and possibly six of the objects were charitable ; that benefits were not confined to members (but in substance it was held they were) ; that benefits were derived from other sources as well as members' contributions (but only to a small extent) ; that benefits were discretionary (but the court found they were in substance calculated on an actuarial basis) ; that the discretion allowed benefits to be paid to members in default ; and that a case showed that a friendly society could be a charity. The court held that the main object of the society was a business arrangement in the form of mutual insurance and that the case was governed by the *National Deposit Friendly Society* judgment.

On the question of which organisation occupies the hereditament (sometimes a vital point), the benevolent and orphan fund of the National and Local Government Officers' Association was held to be the organisation occupying a convalescent home, and not the association, in *National and Local Government Officers' Association* v. *Bournemouth County Borough Council* (1957), 50 R. & I.T. 487 (Q.S.). A flat let to a tenant was held to be occupied for the purposes of the owning trustees, whose main object was the provision of dwellings for the poorer classes (*Guinness Trust (London Fund)* v. *West Ham County Borough Council* (1957), 50 R. & I.T. 465).

Quarter sessions decisions illustrate the meaning of social welfare. A decision given by Mr. W. A. L. Raeburn, Q.C., the learned Recorder of West Ham, is a good illustration of the law of social welfare. It related to West Ham Boys' and Amateur Boxing Club, whose membership was drawn

without restriction from the population of West Ham. The main source of revenue was an annual dinner, £2,000 to £3,000, boys' subscriptions being only £38 and £60 in successive years. Mr. Raeburn held that the club's main objects were concerned with the advancement of social welfare, because the class of persons was sufficiently large, an eleemosynary element was fully present in that members paid but a small fraction of what the benefits they received cost and amateur boxing tended directly to improve the boys' health. He held also incidentally in this case that the reference to playing fields in s. 8 (1) (*c*) did not cut down the meaning of "social welfare" in s. 8 (1) (*a*), particularly in relation to boxing, which was not an open-air sport (*Trustees of West Ham Boys' and Amateur Boxing Club* v. *West Ham County Borough Council* (1957), 50 R. & I.T. 413).

Among the classes of hereditament held to come within s. 8 was a miners' convalescent home for the convalescence of miners from North Derbyshire employed by the National Coal Board and their wives after illness or accident, but also receiving persons sent by outside organisations under special arrangements made with them when accommodation was available (these comprised 25 per cent. of the cases). The home was managed by trustees who acted as a committee of management under a scheme treating it as a charity approved by the Charity Commissioners. No payment was made by the persons sent to the home, but payments were made by the organisations sending them. The hereditament might have qualified as a charity or as being occupied by an organisation concerned with social welfare, and the judgment of Lincolnshire (Parts of Lindsey) Quarter Sessions does not make it clear which arm of the subsection was applied (*Derbyshire Miners' Welfare Committee* v. *Skegness Urban District Council* (1957), 50 R. & I.T. 18).

Sports grounds

Only quarter sessions decisions have been given on the provisions relating to sports grounds and these have not gone very far. One question which gave rise to some difficulty was whether a playing field could qualify which was provided for its employees by a commercial firm evidently itself not coming within s. 8 because it was established for profit. In *Distillers Sports Club* v. *Esher Urban District Council* (1957), 50 R. & I.T. 148, Q.S., a group of companies had granted a playing field without charge to a club as licensees and contributed £6,000 towards the club's finances. Only the staff of the company were permitted to join the club though visitors were allowed. It was held that the field was used or occupied for the purposes of the club and not of the group of companies and so was within the section. The same decision was given in *London Transport Executive* v. *Heston and Isleworth Borough Council* (1957), 50 R. & I.T. 171, Q.S., in respect of a sports ground, pavilion and premises granted by the executive to its staff sports association.

A playing field must be occupied wholly or mainly for the purpose of open-air games or open-air athletic sports. In *London Transport Executive* v. *Heston and Isleworth Borough Council* (1957), 50 R. & I.T. 171, Q.S., a field of 12½ acres laid out in pitches for hockey, football, cricket, bowls and tennis had also a groundsman's house, sheds, shelters and a pavilion, which contained dressing-rooms and showers, a large hall with kitchen servery and a lounge and bar and which was used in connection with outdoor sports, but also for social activities (dances, whist drives, etc.); bar takings were £3,990. Only 200 of the 850 members were playing members. It was held to be occupied mainly for the purposes of open-air games.

On the other hand, in *Parsons Green Club, Ltd.* v. *Fulham Metropolitan Borough Council* (1957), 50 R. & I.T. 186, Q.S., the opposite conclusion was reached in respect of three acres of land comprising five hard tennis courts, two croquet lawns, a bowling green and a putting green with a club-house containing changing rooms, a lounge, bar, cardroom, billiard-room, and annex. The club-house was used socially in the evening for dances, whist drives, etc., and the hereditament was held not to be occupied mainly for open-air games or sports.

A sports ground owned and managed by a limited company which had twice paid a dividend for three clubs, which were not established or conducted for profit, was held to be occupied for the purposes of the three clubs and not of the company and so to be within the section (*Gravesend Cricket, Tennis & Bowls Co., Ltd.* v. *Gravesend Borough Council* (1957), 50 R. & I.T. 613, Q.S.).

Qualification and determination

In order to be entitled to the statutory benefit under s. 8 (2), the organisation must have been rated in 1955–56, because that subsection restricts rates leviable in 1956–57 to those charged in 1955–56, and if no rates were charged in 1955–56 then the provision does not apply. Therefore, an organisation which was exempted from rates in 1955–56 but at the revaluation lost its exemption on a review of its position in 1956–57 could not claim the relief under s. 8 (2) (*Horace Plunkett Foundation* v. *St. Pancras Metropolitan Borough Council* (1957), 50 R. & I.T. 187, Q.S., affirmed by the High Court on the 4th December, 1957).

A rating authority seeking to determine s. 8 relief in any particular case could give the thirty-six months' notice of determination only after 31st March, 1956 (*St. Marylebone Metropolitan Borough Council* v. *London University* (1957), 50 R. & I.T. 801), or perhaps only after 31st March, 1957 (so held by Wynn Parry, J., in that case, but left undecided in the Court of Appeal; but the Master of the Rolls was inclined to share his view). The notice cannot, therefore, have effect before 1st April, 1960, or 1961 if Wynn Parry, J., is right.

F. A. A.

THE SOLICITORS ACT, 1957

ANTHONY REDFERN RUSHFORD, of 8 Moorland Avenue, Barton-on-Sea, New Milton, Southampton, and of 9 Hertford Street, W.1, solicitor, having in accordance with the provisions of the Solicitors Act, 1957, made application to the Disciplinary Committee constituted under the Act that his name might be removed from the Roll of Solicitors at his own instance on the ground that he desires in due course to be called to the Bar, an order was, on 7th November, 1957, made by the committee that the application of the said Anthony Redfern Rushford be acceded to and that his name be removed accordingly from the Roll of Solicitors of the Supreme Court.

On 8th November, 1957, an order was made by the Disciplinary Committee constituted under the Solicitors Act, 1957, that the name of FRANK POPE TREASURE, of No. 33 Rodney Road, Cheltenham, Cornerways, The Park, Cheltenham, and No. 33 Clarence Road, Teddington, Middlesex, be struck off the Roll of Solicitors of the Supreme Court, and that he do pay to the applicant his costs of and incidental to the application and inquiry.

THE ABUSE OF ADMINISTRATIVE POWERS

THE work of the Franks Committee on Administrative Tribunals and Enquiries has prompted considerable discussion about the powers of the court to review and invalidate defective decisions of administrative authorities. The committee's report makes only two recommendations in this respect, namely, (*a*) that a summary appeal on a point of law should (with a few exceptions) lie from administrative tribunals to the court (*vide* para. 113), and (*b*) that statute should never preclude judicial control over administrative tribunals by means of the prerogative orders of certiorari, mandamus and prohibition (*vide* para. 117). If these recommendations are implemented the scope of judicial control will remain much as it is now; the only striking difference will be that the court will be able to invalidate an administrative decision for an error of law even though the error does not appear on the formal record of the proceedings.

It is therefore a matter of practical importance to ascertain the present limits of judicial control over administrative decisions. The familiar grounds for judicial annulment, *ultra vires* and error of law appearing on the record, have already been exhaustively examined elsewhere, and it is not proposed to deal with them again here. Instead, it is proposed to explore a less well known field, namely, the power of the court to invalidate an administrative decision because the power to make it has been abused or misused.

Such abuse or misuse may come about in two ways. The administrative authority may either use the power given to it for a purpose different from that intended by the Legislature (a vice commonly known in this country by the expression coined by the French administrative courts—"*détournement de pouvoir*"); or it may use its power for the proper purpose, but reach its decision by an improper method, for example, by making its decision dependent upon the opinion of a third person. Historically, these two kinds of abuse have been treated quite distinctly by the courts. Use of a power for an improper purpose has always been treated as equivalent to exceeding the powers conferred on the administrative authority, and has been condemned as *ultra vires* (*Westminster Corporation* v. *L.N.W.R. Co.* [1905] A.C. 426); consequently, if the decision of the administrative authority is carried out, and results in harm to an individual or his property, he may normally sue in tort for damages for the harm wrongfully done to him (*Leader* v. *Moxon* (1773), 3 Wils. 461). On the other hand, a decision merely reached by an improper method has always been treated as a complete nullity, and although certiorari has been issued to quash it (*R.* v. *Wood* (1855), 5 E. & B. 49; *R.* v. *Shann* [1910] 2 K.B. 418; *R.* v. *Registrar of Pontypridd County Court* [1948] 1 All E.R. 218), the traditional remedy is mandamus to compel the administrative authority to decide the matter afresh, and it has been suggested that this is the only proper remedy (*R.* v. *Paddington Rent Tribunal; ex parte Kendal Hotels, Ltd.* [1947] 1 All E.R. 448; *R.* v. *Cheshire JJ.; ex parte Heaver* (1912), 108 L.T. 374). It will therefore simplify an examination of the decided cases if the two kinds of abuse are dealt with separately.

Détournement de pouvoir

The simplest case of the use of a power for an improper purpose is when the administrative authority (or, perhaps, the majority of its members) seek to gain a personal advantage, or to impose a disadvantage on some other person, wholly unconnected with the legitimate exercise of the power. This example has been referred to in a number of English cases, but there is no actual decision on the point. Two French cases, however, illustrate it. In *l'arrêt Kault* (Conseil d'Etat, 14th March, 1934), the mayor of a commune issued an ordinance restricting the number of dances open to the public which might be held, in order that custom should not be attracted away from his inn; it was held that his purpose to promote his own interests made the ordinance invalid. In *Commune de Castelnaudary* (C.E., 11th March, 1936), an ordinance made by a local council restricting the holding of political meetings in public was held invalid because the purpose of the majority of the council members was to embarrass their political opponents at the forthcoming elections.

In all the English cases the administrative authority has acted in good faith without any hint of corruption, but its decision has been held invalid because the public purpose it sought to achieve was not the one intended by Parliament. In the leading case of *Municipal Council of Sydney* v. *Campbell* [1925] A.C. 338, a city council was empowered by statute to purchase land compulsorily in order to widen roads, carry out improvements, or remodel any part of the city. It sought to purchase land in the centre of the city adjoining a new road it proposed to construct, so that the increased value of the land attributable to its frontage to the road might be obtained for the benefit of the city instead of the private landowner. The Judicial Committee of the Privy Council held the council's purpose clearly outside the purposes intended by the Legislature and expressed in the statute, and, consequently, it enjoined the proposed purchase.

In *Campbell's* case the impropriety of the council's purpose was manifest from the empowering statute. In many cases, however, the statute is silent as to the proper purpose, and it is then for the court to deduce it from the nature of the power, the results intended to be achieved by the statute in which it is contained, and the surrounding circumstances. For example, in *R.* v. *Paddington Rent Tribunal; ex parte Bell London and Provincial Properties, Ltd.* [1949] 1 K.B. 666, the court had to decide on the propriety of a reference to a rent tribunal by a local council of the rents of over 500 flats in the same block, in pursuance of a council resolution that when any two tenants of flats in a block had successfully applied to the tribunal for a reduction of their rents, the rents paid by the other tenants should automatically be referred as well. The council's power of reference was conferred by s. 2 of the Furnished Houses (Rent Control) Act, 1946, in words which in no way indicated the principles upon which it should be exercised. Lord Goddard, C.J., held that the circumstances surrounding the Act showed that the power was intended to supplement the right of the tenant to apply to the tribunal, so that proper cases should be referred even though the tenant was unwilling to act; consequently the council could exercise its power only after considering each case on its merits, and the reference of a block of over 500 lettings under a blanket resolution was an improper exercise of the power. Another similar example is *R.* v. *Agricultural Land Tribunal for Wales; ex parte Davies* [1953] 1 W.L.R. 722, where the tribunal consented to a notice to quit served on the tenant of an agricultural holding, on the landlord showing that he could farm other land of his own more efficiently if he could combine it with the holding. The tribunal's power to give its consent depended on it being satisfied "that the carrying out of the purpose for which the

landlord proposes to terminate the tenancy is desirable in the interests of efficient farming" (Agricultural Holdings Act, 1948, s. 25 (1) (*a*)). The court held that the consent had been wrongfully given; it could be given only if occupation of the holding by the landlord would promote efficient farming of that holding, not of other land owned by him.

Cases which give rise to considerable difficulty are those where the administrative authority seeks to achieve several purposes by the exercise of its power, some of which are proper but others are not. An illustration of this is afforded by *Westminster Corporation* v. *L.N.W.R.* [1905] A.C. 426, where a council, empowered by statute to construct public lavatories under the street, constructed an underground passage connecting both sides of the street and giving access to a lavatory situate midway. The passage could obviously be used either by persons wishing to use the lavatory or by persons who merely wished to cross the street, but the council had no power to construct underground passages for this latter purpose. The House of Lords held that the council had both purposes in mind, but that the passage was authorised by the statute, unless the principal purpose of the council was to provide a means of crossing the street so that the power to construct a lavatory was merely used as a device to this end. The House held, on the facts, that the council's principal purpose was to construct a lavatory and the work was therefore perfectly lawful.

The "mixed purpose" cases have been made unnecessarily complicated by the distinction drawn by the courts between purpose and motive, an improper motive having no effect on the lawfulness of an administrative authority's acts provided that the purposes it intended to achieve are proper. The distinction originated in the judgment of Vaughan Williams, L.J., in *R.* v. *Brighton Corporation; ex parte Shoosmith* (1907), 96 L.T. 762. In that case a ratepayer complained of the expense incurred by Brighton Council in laying a tarmac surface on its promenade which had previously been in poor repair; the solicitude of the council for the repair of the road was prompted by a desire to attract the Automobile Association's annual car rally to the town. The Court of Appeal held the expenditure lawful because it would benefit all members of the public who used the promenade. Fletcher Moulton and Buckley, L.JJ., said that a subsidiary purpose intended by the council was to attract the A.A. rally, but because the proper purpose (i.e., to benefit all road users) was the principal one, the work was lawfully done. Vaughan Williams, L.J., however, would not admit that the desire to attract the A.A. rally was even a subsidiary purpose; he designated it merely a motive, something which stimulated the council to act, and not a result sought to be achieved by them.

It is difficult to appreciate this distinction: motive and purpose appear to mean the same thing. An example of how two eminent judges may classify the same thing as a motive and a purpose is contained in *Earl Fitzwilliam's Wentworth Estates Co., Ltd.* v. *Minister of Town and Country Planning* [1951] 2 K.B. 284 (affirmed [1952] A.C. 362). In that case a landowner had refused to sell his land at "existing use value" to a person who wished to acquire it, and the Central Land Board made a compulsory purchase order under s. 43 of the Town and Country Planning Act, 1947, which empowered it to "acquire any land for the purpose of disposing of it for development for which permission has been granted." The intention of the Board was to resell the land to the person who wished to acquire it at a price equal to existing use value plus the development charge appropriate to the development he proposed to carry out; it had, moreover, advertised its intention of using its powers of compulsory purchase to compel landowners to sell their land by private treaty at not more than existing use value. The majority of the Court of Appeal held that the Board had exercised its power for the proper statutory purpose of enabling itself to collect development charge, and although they held it improper for the Board to threaten to use its power of compulsory purchase as a means of compelling landowners to sell by private treaty at existing use value, they did not treat that threat as affecting the validity of the Board's compulsory purchase order in the present case. Denning, L.J. (as he then was), dissented; he found the predominant purpose of the Board was to compel sales by private treaty at existing use value, and, because this purpose was improper, the compulsory purchase order was void. On appeal, the House of Lords upheld the majority judgment in the Court of Appeal; Lord Goddard, C.J., dismissed what Denning, L.J., conceived to be the Board's predominant purpose as a mere motive which stimulated it to act, and which consequently did not affect the validity of the compulsory purchase order.

Decisions reached by improper methods

An administrative decision may be invalid because of one of several different improprieties in the manner in which it is reached. The administrative authority may have failed to comply with the procedure laid down for it by statute, or, if it is required to afford the interested parties a hearing before making its decision, it may have disregarded the common-law rules of natural justice which govern all such hearings. It is not with these defects that we are here concerned, however. What we are concerned with is a defect in the administrative authority's mental process of evaluating the evidence presented to it and deducing its decision therefrom.

English law is peculiar in that the court has no general power to test the correctness of administrative authorities' findings of fact. Instead, the court is confined to applying the narrower test whether the authority has taken into consideration some irrelevant matter in reaching its decision, or has omitted to take into consideration all the relevant matters which it ought to consider. If it has fallen short in either respect, its decision is treated as a complete nullity. The application of this test is often made difficult by the failure of the administrative authority to state clearly what matters it did take into account. As the law now stands, it is not obliged to do so in the document recording its decision, and no member of the authority can be compelled to testify in that respect (*Ward* v. *Shell-Mex and B.P., Ltd.* [1951] 2 All E.R. 904). If the recommendation of the Franks Committee (*vide* para. 99) that the decisions of tribunals should state their findings of fact and their reasons is implemented, the court's task in discovering what the tribunal did consider will be made far easier.

It is not sufficient to satisfy the court that the administrative authority's decision on a question of fact is incorrect in order to prove that the authority considered some irrelevant matter (*R.* v. *Cheshire JJ.; ex parte Heaver* (1912), 108 L.T. 374; *R.* v. *Nicholson* [1899] 2 Q.B. 455). The court must be satisfied that the authority took into account some information which has no possible connection with the question it has to decide, or made its decision dependent on the opinion of a third person to whom the power to decide is not given by the law.

A flagrant example of an authority taking irrelevant matter into account is *R.* v. *Shann* [1910] 2 K.B. 418, where licensing justices, to whom two publicans applied for the renewal of their licences to retail intoxicating liquor, decided to renew one licence only, namely, that of the publican who would make the larger payment into the compensation fund. Rather less offensive is *R.* v. *Brighton Corporation; ex parte Thomas Tilling, Ltd.* (1916), 85 L.J.K.B. 1552. In that case Tillings applied to the Brighton Council for a licence under a local Act of Parliament to enable them to run charabanc trips starting from Brighton. The licence was refused because Tillings already ran a regular bus service from Hove to Brighton and set passengers down there, which the council erroneously thought also required to be licensed by them. The court held that this consideration was irrelevant, and issued a mandamus to compel the council to decide Tillings' application for a charabanc licence afresh.

As in the cases where a wrongful purpose on the part of the administrative authority is complained of, the court frequently has to discover the purpose for which a power was conferred in order to determine whether the authority took an irrelevant matter into consideration. For example, in *R.* v. *L.C.C.; ex parte London & Provincial Electric Theatres, Ltd.* [1915] 2 K.B. 466, the London County Council refused to renew the licence of a company to operate a cinema; the company was incorporated in England, but the majority of its shares were held by Germans (then enemy aliens) and half of its directors were also Germans, and it was because of the enemy alien control of the company that renewal of its licence was refused. The statutory power to grant licences was expressed barely as a power to grant them to such persons as the council thought fit. The court held that, having regard to the purpose of the statute to preserve public order and the danger that an enemy-controlled cinema might be used subversively in wartime, the council acted properly in refusing to renew the licence.

It is infrequent that an administrative authority so far abdicates its powers as to make its decision depend on the opinion of an outsider. This happened, however, in *Ellis* v. *Dubowski* [1921] 3 K.B. 621, where a local council which had statutory power to prohibit the showing of undesirable films at cinemas inserted a condition in a licence to operate a cinema that no films should be exhibited there which had not been certified by the British Board of Film Censors. The court held that the condition was invalid; the council was bound to make its own decisions whether or not to prohibit the showing of particular films. The condition held invalid in *Ellis* v. *Dubowski* has now been made permissible by the Cinematograph Act, 1952, s. 3, but, of course, the general principle of that case remains good law.

A decision of an administrative authority will also be void if it fails to take into account some relevant matter which it ought to consider. This does not mean that the authority need make inquiries of its own, unless statute requires it to do so; it means merely that, if it is bound to consider the submissions of an interested person, it must consider all relevant submissions made by him, and its decision is void if it fails to consider any one of them. It is, of course, extremely difficult to prove that the authority has failed to consider a relevant submission, although the Franks Committee's recommendation referred to above will be of help if given effect. The difficulty is that the administrative authority may, without making clear what it is doing, disregard a submission (of fact, law or policy) either because it considers it irrelevant (when in fact it is not), or because the authority does not consider that it leads to the conclusion contended for by the person who submits it (e.g., that evidence submitted is not to be believed, or does not prove his case). If the rejection is because the administrative authority wrongfully considers the submission irrelevant, the court will declare its decision void. If the rejection is because the authority considers that it does not prove the case of the person submitting it, the court is powerless to interfere unless an error of law is involved (*R.* v. *Marsham* [1892] 1 Q.B. 371); a mere error of fact does not entitle the court to act. It is, unhappily, a rare case where the court is able to disentangle the real reason why the authority rejected a submission.

The complexity and uncertainty of this branch of the law does little credit to it. It would be helpful if it were cleared away by Parliament giving the courts power to annul administrative decisions because of errors of fact, as well as errors of law. Such a review of questions of fact need not involve a complete re-trial by the court; it could be limited, like the judicial review of the verdicts of juries, to ensuring that a reasonable man could have reached the same conclusions of fact as the administrative authority from the evidence laid before it.

R. R. P.

"THE SOLICITORS' JOURNAL," 12th DECEMBER, 1857

Referring to a lecture by Mr. Johnson, Professor of Law at Queen's College, Birmingham, THE SOLICITORS' JOURNAL on the 12th December, 1857, said that it "deserves attention, not only for its sound sense and the justness of its legal views, but also because it has been delivered by a solicitor from a professorial chair. It is a very legitimate source of self-congratulation to all members of this branch of the legal profession . . . that a great public institution intrusts the care of its law department to a solicitor . . . It is not the matter of his lecture which interests us so much as the breadth and freedom of his treating his subject which shows a liberal and original mind. His text was the difficulties of the study of the law, which, he pointed out, arose from the great extent of detail in our system, from its historical complications and from its unscientific terminology . . . When . . . a lecturer tells his audience that, for the comprehension of English law, historical knowledge is indispensable, he is uttering a commonplace; but it is a commonplace which, if really accepted by the mind in all its significance, is a key to the most various knowledge and a guide through the most perplexing studies. We can only hope that Mr. Johnson may train up pupils who will appreciate his remark that 'the most technical legal doctrine and apparently the most absurd or antiquated procedure could be shown to have, or once to have had, a good reason or foundation in human nature' . . . It would be of the greatest use to articled clerks if such assistance. . . were placed more generally within their reach . . . The articled clerk copies papers, or picks up from the conversation he hears around him the outline on current business, or perhaps makes himself acquainted with the routine of attendance at the law offices or of practice at the petty sessions; but, as to the study of the law, of legal principles and legal history, he is left to his own guidance and the perusal of text-books."

Common Law Commentary

THE FUTURE OF THE COMMERCIAL COURT

In a recent lecture to the Mansfield Law Club, Mr. Justice Devlin suggested some possible modifications to the procedure of the "commercial court" as a possible remedy for the falling-off in business of that part of the work of the High Court.

The commercial court is, of course, not a separate court, and is more properly referred to as the "commercial list" of the High Court. Specially created at the end of the last century to meet the needs of businessmen and particularly City merchants, it had as its main characteristic the assigning of a judge with commercial experience to be in charge of the list and to have the conduct of the proceedings from the beginning up to and including the hearing. Further, such desirable features as fixed days for hearings and simplified procedure were all a feature of this special type of litigation.

It was meant as a modern forum where the law merchant could be fostered and developed: problems on charter-parties, bills of lading, export contracts, insurance, banking and the like were the matters with which it was particularly intended to deal. But any difficult case on commercial law concerning the sale of goods (even though not involving shipping) or the like would be heard before it unless either party particularly objected. Its main features were a simplified form of procedure and the speeding-up of proceedings in consequence. Instead of the usual statement of claim and defence there were intended to be only "points of claim" and "points of defence." By having a judge in charge of the case from the beginning, interlocutory applications came to him instead of to a master; the greater power of the judge meant that any unnecessary applications could be more readily refused and so that part of procedure could not be used for delaying tactics.

His lordship said that the latter aspect of commercial court work has been successful but not that relating to points of claim or defence. His lordship thought that, because the procedure was known to be peculiar to the court, there was a tendency for practitioners who were not regularly engaged on commercial litigation to avoid using the court because of unfamiliarity. But for those who were familiar with the court, procedure was speeded up and cheapened: they knew their opponents would not apply for, or that if they did they would be refused, interlocutory relief, unless it was essential.

Allowing a fixed day for trial was almost unheard of in 1895 when the court was established, and a further benefit—the right to request a special jury as well as a specialist judge—has survived the Juries Act, 1949 (by s. 19). All this, said his lordship, was then litigation de luxe.

"The luxuries of the last generation are often regarded as the necessities of this," said his lordship, but he then pointed out that although fixed days for trial now applied to other forms of procedure, in the commercial list such dates could more easily be changed, e.g., where witnesses were part of a ship's crew and the ship was delayed. Any reasonable request to change a date or to fix a particular date was acceded to. And a specialist judge (with possibly a special jury) was still the prerogative of the commercial court. Again, having a judge on interlocutory procedure to make short shrift of time-wasters was also a special luxury of the commercial list.

Specialist judges

This scheme for the trial of commercial causes had in the past worked well and produced many judges who went far, said his lordship, mentioning Lord Wright, Lord Atkin, Lord Porter and Lord Sumner, and Lords Justices Scrutton, Greer and McKinnon. It was an exception to the general principle in English law of the trial of disputes that the judge should be a specialist in the matter out of which the dispute arose; it was generally accepted that as a little knowledge is a dangerous thing a judge should not be a specialist and should know nothing of a matter until the morning of the trial when he comes to his robing room and picks up the papers to glance at them for the first time; but, notwithstanding that, the commercial court had proved well suited to its task.

In the olden days the question of custom—whether of the merchants or otherwise—would be left to the jury to be found by them. Indeed, in Lord Mansfield's day you gave documents to the jury and left it to them to say what they meant. In these days it is the business of the judge to say what the businessmen were saying in their negotiations—or rather what they were *not* saying, because in practice so much is taken for granted and left unsaid. Out of that arises the importance of having a judge with commercial experience to try commercial matters.

Pursuing that theme, his lordship invited his audience of lawyers and businessmen to compare the manner of construction of a Lloyd's policy and a will by the courts of law. A Lloyd's policy was often practically a meaningless document: a man might use a marine policy for insuring a matter nothing to do with a ship; he would use suitable loose printed clauses and stick them on a standard form according to what he thought would do and the result often resembled a flagpole with a lot of bunting. When you consider how the House of Lords have construed wills (for example, on the meaning of the word "money") you can be sure that the businessman would not be content with similar treatment. Such problems often come to the commercial court from arbitrators; the parties would get the arbitrators to find the facts and then get the judge to deal with the law. The arbitrators would often be shipbrokers, or brokers on the Baltic or other Exchange, having problems relating to shipping or financial matters as mentioned earlier on.

Decline of the court

It was out of the latter circumstances that we could find an explanation for a decline in the work of the commercial court. The hey-day of the court was after the 1914–18 war when there were often two commercial judges acting concurrently, but to-day the position was very different. Only about a third of the time of the sole judge in charge of the commercial list is occupied with commercial causes, the rest of his time being filled up with other cases. Moreover, only about one-half of that one-third are commercial causes in the sense that they need a specialist judge. The other half consists of cases where a fixed day is wanted and the dispute is vaguely commercial.

The explanation is not that the commercial court is less popular but that there has been a decline in the kind of commercial activities in the City of London which led to the formation of the commercial court. In the days when we

were a maritime power many foreigners came to London to settle their charterparties and contracts of that character. The forms used would provide for arbitration and often that the contract should be governed by English law. If disputes arose the parties went to the London broker who had arranged the contract and if litigation arose they went to the English courts. To-day they go to America or one of several other countries.

The very success of the court meant that it was limited to these specialist disputes and so the ordinary case did not go there, though very often disputes arose on the sale of goods involving difficult points of law which could very well have been dealt with there.

Arbitration a competitor?

His lordship did not think that resort by disputants to arbitration was a cause of the falling-off in the volume of business; it was probable that arbitration in commercial matters had also fallen off. But whether that was so or not the position appeared to be that there was no longer sufficient work for both arbitration and the commercial court. "Would it not be a good thing if the commercial world decided to concentrate on one or other?" asked his lordship; but he went on to express his view that the commercial world does not want to make such a choice because they want arbitration anyway. And there are good reasons for preferring arbitration in many cases. Neither the public nor the Press are present, so that the parties enjoy privacy—one's competitors cannot come in to see how their rivals are faring; it is informal: one cannot be committed for contempt of court if one is a few minutes late. Again, it is very much more difficult to get enforced abroad a judgment of an English court than an English arbitration award.

Yet experience showed that arbitration is the most expensive method of settling disputes. This comment does not apply to an arbitration concerned only with the question whether goods were up to sample or otherwise of the proper quality. But in other causes you have one person finding the facts and another the law; and often the arbitrator does not find all the facts that the judge needs in order to find the law and, in consequence, the case has to be sent back to the arbitrator to find the additional facts. In an ordinary dispute not involving arbitration the reverse procedure is usually followed, that is to say, a judge when giving judgment usually sets out the law first and then finds the facts.

But the fact is that businessmen in commerce apparently like arbitration. Why, then, cannot the arbitrator find the law as well? The answer to that is that one must have a body of legal principles covering commercial law and that can only be explored and developed in a court of law. It was not a case of legal jealousy. What a commercial man wants if concerned in a dispute is to know whether he is going to win or lose and there must, therefore, be a body of law to which to turn. If there is no law, because decisions have been made in private by arbitrators, such businessmen could not be satisfactorily advised on their chance of success.

That means that the last word must be by the judge and therefore one cannot agree in advance to refer all matters of dispute to arbitration. On disputes as to fact, yes, but not law. Why then cannot the court decide the whole thing? The reason is, whether a good or bad reason, the preference of the merchant for those advantages of arbitration. Commonly held views on what such men are supposed to care about are wrong: it is generally thought that they want disputes dealt with cheaply and expeditiously. But it seems clear that they do not care about either money or speed. Even with the speediest procedure disputes could not be dealt with in a few days, and unless the matter was of that character time did not seem to matter.

The result is that we have the wasteful system of a specialist judge not fully employed and a goodly number of arbitrators. The day may come when it is felt that there is no longer any justification for this system, but it would be a sad thing if, after more than half a century, the commercial list were to depart.

Informality and privacy in court?

His lordship made a novel proposal: he said that he thought that something could be done to meet the ideas of businessmen and to bring the law more in touch with their needs. If informality and privacy were what they wanted why should they not have it in the commercial court? There must be a public hearing for crime and tort, but where you have a dispute which simply concerns two individuals and no one else, if they wanted it held in private and not in public why should they not have it, with some degree of informality? The majesty of the law is necessary for a murder trial, but the contrast between such a matter and, say, a dispute concerning a c.i.f. contract is so great that there is no need for any such pomp and circumstance to attach to the latter.

L. W. M.

A Conveyancer's Diary

CHARITABLE APPEALS: DISPOSAL OF SURPLUS FUNDS

WHAT is to happen to funds which have been collected for some purpose and which remain in the hands of the collectors as surplus funds when the purpose has either been fulfilled or failed? This is a problem which has become familiar in recent years, through a number of reported cases, to which may now be added the case of *Re Gillingham Bus Disaster Fund* (reported so far only in *The Times* newspaper, on the 8th and 28th November respectively). This case is a good starting-off point for a look at the present state of the law on this subject, which is not very satisfactory.

The facts in the *Gillingham* case are recent enough in the memory to make only a short recapitulation necessary. Four years ago a bus ran into a column of cadets who were marching along a road in darkness, killing twenty-four of them and injuring others. This accident happened in Gillingham, and the cadets belonged to that town and other neighbouring towns, the mayors of which, with great promptitude, opened a memorial fund. There was no trust deed or anything like a trust instrument, and the absence of such an instrument is the prime cause of the troubles which arise when funds of this kind are raised and not fully expended. In a similar case, *Re North Devon and West Somerset Relief Fund* [1953] 1 W.L.R. 1260, Wynn Parry, J., had occasion to say: "... it is legitimate and, indeed, necessary to remember

that this appeal was issued only three days after the disaster . . . and it bears the stamp of having as its authors people who had not had time, if indeed the desirability ever crossed their minds, of consulting their legal advisers." What did duty for a trust instrument in the *Gillingham* case, or at least was accepted by the court as the best available indication of the purposes of the appeal, was a letter from the town clerk of Gillingham which was published in a national newspaper, and which stated that " the Mayors of Gillingham, Rochester and Chatham have decided to promote a memorial fund to be devoted, among other things, to defraying the funeral expenses, caring for the boys who may be disabled, and then to such worthy cause or causes in memory of the boys who lost their lives as the mayors may determine." The appeal evoked a generous response and nearly £9,000 was contributed, partly in substantial sums by known persons, but mainly anonymously as a result of street collections and the like. Of the amount collected, less than one-third was expended, the small amount expended being due to the fact that compensation was paid by the company which owned the bus in respect of the deaths and injuries of the cadets who had been killed and injured.

What was to be done with the surplus ? Three suggestions were made at the hearing of the summons which was taken out to have this question decided : that the surplus should be repaid to the contributors in proportion to their contributions ; that it should be applied for charitable purposes *cy près ;* or that it should pass to the Crown as *bona vacantia*. Before considering the judgment of Harman, J., on this part of the case it is instructive to look at one or two earlier decisions on the same kind of problem.

The " out and out " gift principle

In *Re Welsh Hospital (Netley) Fund* [1921] 1 Ch. 655, a committee formed for the purpose at the beginning of the 1914–1918 war in Wales with the view of raising funds for the establishment of a Welsh hospital for Welsh soldiers wounded and suffering from illness during that war appealed for subscriptions for that purpose. Large sums were received, partly by subscriptions from private individuals, and partly by other methods, including street collections. With the funds so raised a hospital was opened at Netley and the expenses of its upkeep until it was closed after the war were also defrayed thereout. A surplus of several thousands of pounds remained in the hands of the trustees of the fund, who wished to apply it for various educational purposes in Wales. Only two competing views as to the destination of the surplus were put forward in this case : either, it was said, there was a resulting trust for the donors, or the surplus was applicable *cy près* (the *bona vacantia* point is very new, as will be seen). P. O. Lawrence, J., held that there was no resulting trust, but that there was a general charitable intention on the part of the donors for sick and wounded Welshmen which, on the failure of the particular mode of applying the funds selected by the trustees (the Netley hospital), enabled the court to order the application of the funds *cy près*.

One passage in the judgment of P. O. Lawrence, J., is of particular interest. After referring to the various methods used in collecting the funds, he went on : " So far as regards the contributors to entertainments, street collections, etc., I have no hesitation in holding that they must be taken to have parted with their money out and out. It is inconceivable that any person paying for a concert ticket or placing a coin in a collecting box presented to him in the street should have intended that any part of the money so contributed should be returned to him when the immediate object for which the concert was given or the collection made had come to an end . . . So far as regards individual subscribers of substantial amounts, the proper inference to be drawn is not quite so plain. In my opinion, however, these subscribers must be taken to have known that they were contributing to a general fund which was being raised in the manner I have described, and that their contributions would be aggregated with the proceeds of entertainments, street collections, etc., and would not in any way be earmarked . . . In these circumstances I am of opinion that the true inference to be drawn is that these subscribers intended to part with their contributions out and out, and that they did not intend that the surplus, if any, should be returned to them when the immediate object of the charity should have come to an end."

This decision was followed in the *North Devon and West Somerset Relief Fund* case, where there was a substantial surplus for disposal from a fund which had been raised to relieve distress after the severe floods which affected the Lynmouth-Lynton area in the late summer of 1952. Wynn Parry, J., having considered the nature of the trusts on which the fund was held and decided that they were charitable, cited a long passage from the judgment of P. O. Lawrence, J., which included the part I have quoted, and held that no substantial distinction could be drawn between the two cases. Both, therefore, are cases in which the principle of the " out and out " gift was applied, and this principle was held to negative any resulting trust to the donors.

But this was possible (and here lies the distinction between these two cases on the one hand and the *Gillingham* case on the other hand) because in these two cases behind the immediate object " there was a more extended object than might be said at first sight to appear on the face of the appeal " : *per* Wynn Parry, J., in the *North Devon and West Somerset Relief Fund* case. In that case, it was an intention to relieve hardship by the local people and others in the area at the time of the disaster. In the *Netley Hospital* case, " although all the contributions were in the first instance made for the particular purpose of building, equipping and maintaining the Welsh hospital at Netley, the main underlying object of the contributions was to provide money for the comfort of sick and wounded Welshmen, and all the subscribers intended to devote their contributions not only to the particular object, but generally to the benefit of their sick and wounded countrymen."

The position in the *Gillingham* case was very different. This aspect of the case was dealt with by Harman, J., in the first of his two judgments, viz., that reported on the 8th November. Taking the town clerk's letter as the instrument constituting the trusts, this began by saying that the fund was to be devoted " amongst other things " to certain objects. That, on the face of it, would enable the fund to be devoted to any object in the world, and it could not be the true meaning. In the learned judge's view these words had to be read so as to confine the objects to such worthy objects as would keep green the memory of the boys. But that did not help much. It was admitted that the expressly specified objects—funeral expenses, and care of the boys—were not charitable, there being no element of poverty nor any section of the public involved. Further, " worthy " objects would clearly include non-charitable objects. It was thus quite impossible to say that this trust was a charitable trust, and no question of the application of the fund *cy près* could arise. One of the three competitors for the surplus fund (the Attorney-General, as representing the cause of charity) having therefore been

eliminated, there remained two others in the ring: the subscribers claiming on a resulting trust, and the Crown claiming as *bona vacantia*. Harman, J., having heard argument on this contest, reserved his judgment, which he delivered some weeks later, as reported in *The Times* on the 28th November.

Gift *sub modo*

Harman, J., first referred to the general principle, which is that where money is held on trust and the trusts declared do not exhaust the fund it reverts to the donor under what is called a resulting trust. The reasoning behind this (he went on) is that the donor does not part with his money absolutely out and out but only *sub modo*, to the intent that his wishes as declared by the declaration of trust should be carried into effect. When, therefore, this has been done, any surplus belongs to him. This doctrine, in the learned judge's view, did not rest on any evidence of the state of mind of the donor, for in the vast majority of cases no doubt he does not expect to see his money back; he has created a trust which, so far as he can see, will absorb the whole of it. The resulting trust arises where that expectation is for some unforeseen reason cheated of fruition and there is an inference of law based on after knowledge of the event.

This judgment as reported at present goes on as follows: Counsel for the Crown admitted that it was for him to show that this principle did not apply, but in [*Re Ulverston and District New Hospital Building Trusts* [1956] Ch. 622, at p. 633] Jenkins, L.J., had thrown out the suggestion that donations [in that case, to a fund to found a new hospital, an object which was frustrated after considerable funds had been collected in various different ways and from various different sources] from unidentifiable sources may in such a case be treated as *bona vacantia*. The Crown had argued that subscribers to the Gillingham fund must be taken to have parted with their money out and out, and that there was no room for a resulting trust. But the Crown had, in Harman, J.'s judgment, failed to show that the case should not follow the ordinary rule merely because there were a number of donors who were (it may be assumed) unascertainable. There was no reason to suppose that the small giver who was anonymous had any wider intention than the larger giver who could be named. They all gave for one object, and if they could be found by inquiry the resulting trust could be executed in their favour; if they could not, Harman, J., could not see how the surplus could change its destination and become *bona vacantia*. It would merely be money held on a trust for which no beneficiary could be found. Such cases are common: the trustees must pay the money into court like any other trustee who could not find his beneficiary and there would be an inquiry for the names of subscribers to the fund.

An overriding intention?

The logic of this decision is, if one may say so, impeccable, except at one point. If the donor is taken to part with his subscription to a fund of this kind not out and out but only *sub modo*, to a particular extent and with a particular intention, and this principle does not rest on any evidence of the state of the donor's mind at the time ("he has created a trust which, so far as he can see, will absorb the whole"), is it not possible equally to attribute to the donor, not on evidence of his state of mind but as a general principle, an intention that if the trust fails, his money will be applied for some other purpose, perhaps an analogous purpose, but at any rate some purpose which by exhausting the fund will fulfil his overriding intention, which is not to see the money back again? I think that there is perhaps some support for this kind of approach to this problem in certain observations of Jenkins, L.J., in *Re Ulverston and District New Hospital Building Trusts*, *supra*.

The facts in that case were that over a number of years appeals were made to the public for funds for the building and endowment of a new local hospital. Considerable funds had been collected when, for various reasons, including the coming into operation of the National Health Service Act, 1946, this purpose became impracticable. The trustees applied to the court for directions as to the disposal of the fund, part of which had been subscribed, as in all these cases, by ascertainable donors and part from unidentifiable sources—street collections and the like. The two opposing views as to the destination of the fund were, as in the *Netley Hospital* case and the *North Devon and West Somerset Relief Fund* case, that the trusts on which the fund was held revealed a general charitable intention and that the fund was therefore inapplicable *cy près*, or that the fund was held on a resulting trust for the donors. The Court of Appeal held, on the facts, that the fund had been collected with the sole object of building a particular hospital and not for general charitable purposes, and that as that object had become impracticable the fund belonged to the donors. An inquiry was directed to ascertain the donors and the amounts of their subscriptions.

General charitable intention by way of infection

One of the arguments in favour of a *cy près* application was that so far as the persons who had contributed by placing a coin in a collecting box or the like were concerned, they must be taken to have parted with their money out and out, and if they were taken to have parted with their money out and out they must be taken to have done so with a general charitable intention. From that, it was argued, it followed that named subscribers, being aware that their subscriptions would be mixed with non-returnable contributions from anonymous sources, must be taken to have contributed with a similar general charitable intention. This argument of an imputation of a general charitable intention by way of infection, as Jenkins, L.J., put it, was not accepted by the Court of Appeal, but it was supported (it was argued) by something which had been said by the Master of the Rolls in *Re Hillier* [1954] 1 W.L.R. 700. As to that Jenkins, L.J., in the *Ulverston* case made certain observations which, as I have said, I think are relevant to the particular question now under discussion. "In my view," he said, "Evershed, M.R., was not seeking to lay down a general principle to the effect that in all cases where a fund of this kind is found to include contributions from anonymous sources, a general charitable intention must be imputed to the named subscribers, however clear it may be that their subscriptions were solicited and made solely and exclusively for one particular purpose. I think his observations . . . were intended to be confined to cases comparable to the one then in hand (i.e., in *Re Hillier*), that is to say, cases in which the circumstances in which the fund is raised are such as to leave it open to doubt whether the named subscribers did or did not contribute with a general as distinct from a particular charitable intention. In such cases the inclusion of anonymous contributions is a factor which—so Evershed, M.R., held—may be taken into account for the purpose of resolving the doubt in favour of a general charitable intention."

The particular problem to which these remarks were directed was, of course, different from that in the *Gillingham* case: the trusts in this case were not charitable, and no question of the imputation of a general charitable intention could arise.

But the source of the infection by way of which such an intention may, in certain cases, as the Master of the Rolls said, be imputed to certain subscribers is the imputation of an intention on the part of certain other subscribers not to see their money back. The remarks of Lawrence, J., in the *Nelley Hospital* case quoted earlier in this article are also relevant in this context. They all suggest that a gift may in certain circumstances be made "out and out," with an intention never to receive it back again. (This was not the view taken of the intention of subscribers in the *Ulverston* case, but that is another matter.) Does not this then negative any resulting trust? And if a resulting trust is negatived, is it not irrelevant whether the object for which the fund was collected, and which has failed, was a charitable or a non-charitable object?

The Crown's claim

If the principle of a resulting trust can be cleared away from these cases, then wherever there is no general charitable intention, because the object was either a particular charitable object (as in the *Ulverston* case) or a non-charitable object (as in the *Gillingham* case), the Crown's claim to take the surplus as *bona vacantia* becomes incontestable. The Crown would then be in a position to apply the surplus on something like the principle of *Re Slevin* [1891] 2 Ch. 236, for some analogous purpose.

That would be an admirable result in cases like this, but unfortunately only the House of Lords could eliminate the decisions which stand in its way, and it is not very likely to do so, for the Crown is hardly likely to push a claim for *bona vacantia* as far as that. A more likely expectation may be legislation to enable the Crown to take in circumstances where it is reasonably clear that donors have abandoned all claim to their contributions, with parallel provisions for a simple advertisement for claimants who want their money back, on the footing that the Crown directs the application of the funds so coming to it for charitable purposes under the sign manual. More will be heard of this subject when the inquiry in the *Gillingham* case has been completed and its costs are ascertained.

"A B C"

Landlord and Tenant Notebook

EFFECTS OF CHANGES OF LAW

A GLANCE at the bookcase housing "Statutes" will satisfy anyone not only that our laws change but also that they change more frequently than they used to. Whether this is desirable or not may be open to question. Immutability has never been a characteristic of any system of law; it was, I am aware, once contended—by interested parties—that the laws of the Medes and Persians possessed that quality, but the contention does not appear to have been accepted.

A change of the law during the currency of a lease may well upset the calculations of one of the parties. There are, of course, cases in which this is just what the Legislature meant to bring about: rent control legislation, agricultural holdings legislation, business tenancies legislation. There are also cases in which the possible effect has been foreseen and provided for, e.g., by authorising modification of the lease, as when a demolition order or a clearance order is made under the Housing Act, 1957, or expense is incurred in making alterations to premises under the Factories Act, 1937. But in this article I propose to examine the position of a party to a lease whose reaction to a change is "That is not what I bargained for" and to see in what circumstances, if any, *pacta sunt servanda* may be held to be subject to *rebus sic stantibus*.

Paradine v. Jane

Though the difficulties which confronted Farmer Jane or Iane did not exactly arise from a change in the law—and, indeed, the facts alleged were, like the presence of a snail in a ginger-beer bottle in *Donoghue* v. *Stevenson* [1932] A.C. 562, never proved—the judgment of the Court of King's Bench in *Paradine* v. *Jane* (or *Iane*) (1647), Aleyn, 26; Sty. 47, contains a statement which has often been applied when such difficulties have arisen.

It was in answer to a claim for arrears of rent that the defendant pleaded (according to Style) "that Prince Rupert, an alien, and an enemy to the King, invaded the land with an army, and with divers armed men did enter upon him, and did drive away his cattell, and expelled him from the lands let to him by the plaintiff, and kept him out that he could not enjoy the lands for such a time; and demands judgement if for the rent incurred during that time the plaintiff ought to have his action?" "That time" was, according to Aleyn, from "the 10 of July 18 Car. till the Feast of the Annunciation, 21 Car."; and in this report the statement is followed by: "whereby he could not take the profits."

The important part of the resolution of the court in which the plaintiff's demurrer was allowed ran: "Where the law creates a duty or a charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him . . . but when the party *by his own contract* creates a duty or charge upon himself, he is bound to make it good, *if he may*, notwithstanding any accident by inevitable necessity, because *he might have provided against it by his contract*. Now the rent is a duty created by the parties . . ."

Roll, J., perhaps experiencing an urge to reconcile law and justice, added that as a lessee was to have the advantage of casual profits so he must run the hazard of casual losses. Whether this had any soothing effect on the defendant's feelings may be open to doubt; it is possible that, like one of Dr. Wodehouse's characters, his state of mind was that of one "not exactly disgruntled, but far from being gruntled," and that he indulged in adverse comment on those who expected him to foresee, some years ahead, the conduct of a dashing cavalry commander whose own superior officers did not know what he would be up to two hours or so ahead.

Emergency legislation

Paradine v. *Jane* was, of course, the occasion for the enactment, in our own time, of the Landlord and Tenant (War Damage) Acts, 1939 and 1941. But the principle was applied, more than once, in cases arising out of the emergency legislation of both World Wars; nor did the Acts referred to have the effect of modifying every obligation the performance of which was made difficult or impossible.

In *London and Northern Estates Co.* v. *Schlesinger* [1916] 1 K.B. 20 the defendant was an Austrian subject who had taken a three years' tenancy of a flat from the plaintiffs, the tenancy commencing Lady Day, 1914. Later in that year the Aliens Restriction Act, 1914, was passed, and by reason of the Aliens Restriction (Consolidation) Order of 9th September it became unlawful for the defendant to reside in the particular district where his flat was situated. The action was for the quarter's rent due Lady Day, 1915. The defendant pleaded, not that rent was excused, but that the tenancy had been determined, and the arguments advanced for him relied substantially on the "Coronation" cases. Those advanced for the plaintiffs did not, strange to say, invoke *Paradine* v. *Jane*, but urged that he could have assigned or sub-let or lent the flat to someone else; but Lush, J., did conclude his judgment by pointing out that the tenancy agreement was not a contract and nothing more; it vested a term of years in the defendant, and the Order in Council had not deprived him of his interest. And this statement was adopted by Reading, L.C.J., in *Whitehall Court, Ltd.* v. *Ettlinger* [1920] 1 K.B. 680, in which it was unsuccessfully argued that the tenant of a requisitioned flat had been evicted by title paramount.

But *Paradine* v. *Jane* made itself felt in the leading case of *Matthey* v. *Curling* [1922] 2 A.C. 180, an action for rent due under and breaches of repairing covenants contained in a lease of a house granted in 1898 for a term of twenty-one years. The house had been requisitioned in January, 1918, and been destroyed by fire in February, 1919. Referring, in the course of his speech, to *Paradine* v. *Jane*, Lord Buckmaster declined to draw a distinction between what was lawfully done and what was unlawfully done; all that mattered was that the lessor was not responsible. And Lord Atkinson quoted the "When the party by his own contract creates a duty . . because he might have provided against it by his contract" passage and the "rent is a duty" passage which followed it, with approval.

And for an example of the operation of this *pacta sunt servanda* principle in circumstances affected by World War II emergency legislation, one can turn to *Eyre* v. *Johnson* [1946] K.B. 481, in which a tenant, on the determination of a lease granted in 1930, unsuccessfully sought building licences under Defence (General) Regulations, 1939, No. 56A, in order to comply with his obligations to yield up in repair. In the judgment of Denning, J. (as he then was), we find a quotation from Lord Buckmaster's speech in *Matthey* v. *Curling*: "He [the tenant] has bound himself to do these definite acts, and it is no excuse that circumstances which he could not control have happened and have prevented his compliance."

Licensing law

Wartime legislation is often hurriedly enacted, and the statutes passed in such circumstances are apt to overlook what might have been covered had there been more time. But it has happened that measures of quite a different kind have taken parties to tenancy agreements by surprise.

Take *Jones* v. *Bone* (1870), L.R. 9 Eq. 674. In 1854 some building land was sold in plots, every purchaser entering into a carefully worded covenant restricting user. None of the pieces or parcels except six, coloured red on a map or plan, was during the next twenty years to be used as the site or sites for any hotel, tavern, public-house, or beer-house, nor should the trade or calling of an hotel or tavern-keeper, publican, or beer-shop, or *seller by retail of wine*, beer, or spirits or spirituous liquors at any time be used, exercised, or carried on at or upon any houses or buildings which may be erected upon, etc.—the draftsman seems to have been fully conscious of the need for providing against accident or inevitable accident. The plaintiff bought one of the plots coloured red and carried on business as a publican at the "Nightingale" thereon; the defendant was a grocer who held a ten years' lease of a shop on a site not so favoured but who, when the Wine Licences and Refreshment House Act, 1860, was passed, took advantage of its provisions by dealing in wine in bottles containing not less than one reputed pint; before then, two gallons had been the minimum retail quantity. James, V.C., refused an injunction by reference to the principle that one must consider what parties have in mind when they make their covenant. The defendant was not carrying on "the business of a seller by retail of wine, beer or spirits or spirituous liquors" (which covered innkeepers and those who conducted gin palace bars alike) as understood by vendor and purchasers in 1854.

But in *Grimsdick* v. *Sweetman* [1909] 2 K.B. 740 the defendant was a tenant who had lost his licence as "redundant" when the Licensing Act, 1904, was passed. He held the demised premises under a tenancy agreement made in 1895 which obliged him, *inter alia*, at all times during the said term to continue the said premises as a beer-house and conduct the same in a proper and orderly manner, etc. When the licence was taken away the defendant took the line that the tenancy was at an end, but the plaintiff refused to accept possession and the action was for a half-year's rent. The fact that both parties had received some compensation under the new Act (landlord, £155; tenant, £100) was made much of, and was referred to in the judgments, but the *ratio decidendi* was substantially the same as that of *Paradine* v. *Jane*. Darling, J., considered that the arguments advanced for the tenant amounted to a contention that he had become a trespasser or at most a tenant at will; Jelf, J., observed, as the seventeenth-century Roll, J., might have observed, "I know no reason why the parties to a lease of premises licensed as a beerhouse should not expressly agree that, if it becomes impossible to continue to use the premises as a beer-house, the lease shall terminate; but they have not said so in terms in this lease . . ."

Compulsory acquisition

It was something very like hair-splitting which saved the tenant in *Baily* v. *De Crespigny* (1869), L.R. 4 Q.B. 180, from the consequences of not foreseeing, in 1840, the railway development fever which was at its height in the 'sixties. He had taken a lease for a term of eighty-nine years, covenanting against building and permitting building. Came the London, Brighton and South Coast Railway (New Lines) Act, 1862, compulsory acquisition, and a railway station on the land acquired. In this case it was held that the tenant was discharged from his covenant; and this was said to be on the *lex non cogit ad impossibilia* principle which, it can be agreed, would not have operated in the other cases I have mentioned. But the reasoning of Hannen, J., to the effect that the present event was of such a character that it could not reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, might well have been applied to *Paradine* v. *Jane*. More subtle, however, was the point that the word "assigns" in the lease did not cover such assigns as the London, Brighton and South Coast Railway, acquiring their interest not by contract but by statute.

Anticipating decontrol

To come to something of topical interest. Among the many unusual features of rent control legislation is a provision which actually invites us to consider the possibility of change of law; and "there is nothing," Maule, J., said in *Oswald* v. *Mayor, etc., of Berwick upon Tweed* (1854), 23 L.J.Q.B. 320, "to prevent parties, if they choose by apt words . . . from binding themselves by a contract as to any future state of the law."

The "alternative accommodation" ground for possession (Rent, etc., Restrictions (Amendment) Act, 1933, s. 3 (1) (*b*)), stipulates that, failing a housing authority's certificate, accommodation shall be deemed to be suitable if it consists either (subs. (3)) (*a*) of a dwelling-house to which the principal Acts apply, or (*b*) of premises to be let as a separate dwelling on terms which will, in the opinion of the court, afford to the tenant security of tenure reasonably equivalent to the security afforded by the principal Acts in the case of a dwelling-house to which those Acts apply, and is, etc.

Before the Rent Act, 1957, s. 11 (2), decontrolled new lettings, a landlord in a position to offer or prove the availability of some other residential premises, and who was, according to *Cumming* v. *Danson* (1942), 112 L.J.K.B. 145 (C.A.), less likely to be met by the "not reasonable to make an order" defence than a landlord claiming on other grounds, could usually hope to succeed if the alternative accommodation was suitable as regards the needs and means of the tenant. But, as *Scrace* v. *Windust* [1955] 1 W.L.R. 475 (C.A.) showed, an offer of an unprotected weekly tenancy (in that case the landlord's own plans would have effected decontrol, as he proposed producing separate and self-contained premises and the recently enacted Housing Repairs and Rents Act, 1954, s. 35 (1), would have excluded them from protection) does not meet the case; and the decontrol of new lettings has, therefore, made it more difficult to operate the alternative accommodation ground.

So now a landlord may have seriously to consider what security of tenure the Acts afford. So far, the problem has been touched upon at county court level: in *Fulford* v. *Turpin* (1955), 8 J.P.L. 365, a landlord who was in the same predicament as the plaintiff in *Scrace* v. *Windust*, but who was himself a lessee with sixteen years of his term unexpired, satisfied the learned judge at Bromley County Court that a sub-lease for sixteen years less one week would afford the required security of tenure. At present, not only may the power to decontrol by ministerial order contained in the Rent Act, 1957, s. 11 (3), have to be taken into consideration, but also the agitation from various quarters (see, for instance, letter at p. 898, *ante*) for restoring control. County court judges will not welcome the idea of politics becoming a factor in the formation of judicial opinion, but it looks as if there may be cases in which the introduction of such an element is inevitable.

One solution which might, I suggest, appeal to a court would be an offer of the alternative decontrolled accommodation for a term of 999 years, the landlord having an option to break by fifteen months' notice if and when tenanted premises of that value became decontrolled.

R. B.

FOR THOSE IN PERIL ON THE SEA

NUMEROUS similes and metaphors have been used in an attempt to describe this transitory life, but perhaps one of the most apt is that which likens it to a voyage across the sea. There are days when all is calm, but more often the seas are tempestuous. Although storms rage about us from time to time most of us are not shipwrecked but are able to continue to steer a steady course. Our ships are well built and we are, to some extent at least, masters of our own destinies. Unfortunately, there are many of our fellow men whose lives depended upon flimsy rafts which have been easily overcome by the storms and who now find themselves in a swirling sea. They need the help of the lifeboatmen, and it is for the work of those who dedicate their lives to rescuing others that we appeal year by year in this issue of THE SOLICITORS' JOURNAL.

Those who most readily arouse our sympathy are the children, those who are not prepared to leave the protection of the harbour of their birth yet are cast, defenceless, amidst the tossing waves. Many societies spare nothing to rescue them from their immediate danger and do all that is within their power to train and educate the children and give them a home where they know that they will be cared for and can feel that they are members of a family, albeit a very large one. Alternatively, the children are placed with foster or adopting parents or arrangements are made for them to begin a new life in another country within the Commonwealth. In a word, all that is humanly possible is done to enable the innocent victims of broken homes, the sick, neglected, orphan and unwanted children of this age and those who have been subjected to criminal assaults to face with confidence the gathering storms of life. No destitute child is ever refused.

Others at sea are surrounded by a dense fog. It never lifts. They are blind. The lifeboatmen come to their aid, not so much to tow them safely into port but to give them instruments with which to pierce the darkness with which they are surrounded and enable them to continue their journey under their own steam. A blind mariner upon the sea of life, or one who is deaf or dumb, does not like to feel dependent upon others for all things, and some voluntary organisations devote their energies to meeting their spiritual and material needs by providing clinics, financial assistance, education, training for new work and accommodation, and, for the blind, literature in braille and guide dogs.

The young and inexperienced seamen are those most likely to go off course and organisations exist and clubs are provided to guide and train them and to help them to find their way again if they should have gone astray. If older persons lose their way and have to pay the punishment of imprisonment charities are at hand to help them in their difficult task of continuing life's journey in what is often a sea of suspicion and distrust.

Some seafarers are handicapped in that they begin their pilgrimage in crippled or disabled boats and others suffer damage on the way. The lifeboat called "Charity" is at their call and their need for hospitals, convalescent homes, accommodation, financial assistance and vocational training and their general welfare is constantly attended to with loving care.

All young men and many young women find that on the verge of adult life they are called upon to serve in the forces and others volunteer to serve for a longer period or for service

in the merchant navy or in the fishing fleets. Work is undertaken throughout the world with a view to caring for their physical, mental and spiritual welfare. If they are injured or meet particular difficulties rehabilitation and assistance are available: if they are killed their dependants are cared for and their children given the education which might reasonably have been provided by their fathers who have been taken from them.

The work of rescuing those in need is not confined to those in this country who have been unable to withstand the violence of the storm. The work extends throughout the world to those shipwrecked on a distant shore. Missionary societies in particular seek to help the needy in far-off lands through their work of healing, teaching and preaching and the distribution of copies of the Bible and other Christian literature. As missionaries devote their energies to the repairing of their leaking ships, training them in seamanship and offering a compass for life to those to whom they preach, we are reminded that their sacrifice, and that of all who engage in charitable work, must be matched by the generous support of those whose voyage is in home waters.

Old folk and those who suffer from incurable disease or serious illness are not forgotten, and havens, which are homes in the warmest and fullest sense of the word, are provided to shelter them from the stormy blast of loneliness and helplessness. Some need an additional pension, others a holiday in the country or beside the sea. Whatever their need, in the name of charity many organisations are there to meet it. Prevention is better than cure and research is constantly carried out to discover ways in which those diseases which are now regarded as incurable may be overcome and to prevent and control disease by research, education and propaganda.

The welfare of animals which are old, sick or have been ill-used is not overlooked, and clinics, research establishments, rest homes and homes for those which are unwanted are provided, and inspectors are on their guard to see that animals are not caused unnecessary suffering.

All this work, and much more besides, is undertaken out of charity, out of love, for those who have found the voyage harder than they are able to bear. Those who seek to act as lifeboatmen to their fellow men in distress do so with no desire for material reward, but the fact remains that if they are to continue their life-saving and life-building work, which has not and can never be adequately undertaken by the State, they do need financial support. It is also a fact that most of us are prepared to be more generous at Christmas than at any other time of the year. This may be because of the mystical " Christmas spirit " which is in the air; it may be because we subconsciously compare the wealth, warmth and completeness of our own family circle with that of those who are less fortunate; it may be because at Christmas we celebrate the birth of one who commanded us that " whatsoever ye would that men should do to you, do ye even so to them " and who Himself was able to rebuke the winds and the raging sea of Galilee and make a great calm to the joy and relief of those who journeyed with Him.

Whatever the reason, we are able to make this appeal more easily as Christmas approaches and we believe that as in previous years this appeal for those in peril on the sea of life and their dependants will not be in vain. In the words of Philipp Bliss :—

> Trim your feeble lamp, my brother,
> Some poor sailor tempest-tossed,
> Trying now to make the harbour,
> In the darkness may be lost.
> Let the lower lights be burning,
> Send a gleam across the wave,
> Some poor fainting, struggling seaman
> You may rescue, you may save.

May we all, this Christmastide, remember the work of those whose lives are spent rescuing those sailors on life's journey who are tempest-tossed and help them to send a gleam of hope and encouragement across the turbulent seas.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

House of Lords

SHIPBUILDING REGULATIONS: PUBLIC DRY DOCK: HOLE IN DECK: INJURY TO SEAMAN: SHIPOWNERS' LIABILITY

Canadian Pacific Steamships, Ltd. *v.* Bryers

Viscount Kilmuir, L.C., Viscount Simonds, Lord Morton of Henryton, Lord Tucker and Lord Keith of Avonholm

25th November, 1957

Appeal from the Court of Appeal ([1957] 1 Q.B. 134; 100 Sol. J. 816).

An able seaman employed by the owners of a ship which was undergoing overhauling and repair in a public dry dock sustained injuries when, in the ordinary course of his work, he fell into an opening in a deck of the vessel which had been left uncovered. It was not a part of the vessel affected by the repairs. At the time of the accident a number of contractors were under direct contract with the shipowners to make specialist repairs. The seaman sued the shipowners, claiming damages on the ground, *inter alia*, of breach of reg. 10 of the Shipbuilding Regulations, 1931. The trial judge found for the plaintiff, and on appeal the shipowners contended (1) that the exceptions to the proviso in the section of the regulations headed " Duties " only came into operation where there was one notional occupier, and, in the circumstances of the present case, the shipowners owed no duty under reg. 10. (2) They also contended that the plaintiff was not a person upon whom the regulations conferred a civil right of action. The Court of Appeal having affirmed this decision, the shipowners appealed to the House of Lords. The regulations provided as to " Duties ": " It shall be the duty of the occupier to comply with . . . these regulations. Provided that when a ship is being repaired in a public dry dock, the person who contracts with the owner of the ship . . . to execute the work of repair shall be deemed to be the occupier for the purposes of Pts. I to VIII and it shall be his duty to comply with the said Parts except as follows: . . . (*b*) When the control of the ship apart from the work of repair remains with the shipowner, it shall be the duty of the shipowner . . . to provide the protection specified in reg. 10 so far as concerns those hatches or openings which are not required to be used for the purposes of the repairs . . . " By reg. 10 it was required that " all openings in the decks . . . shall be securely protected."

Viscount Kilmuir, L.C., said that, as to the appellants' first submission, he had no doubt. (1) The words " except as follows " were equivalent to " but." (2) The regulations showed a sound allocation of duties between those in control of the dock and those in control of various parts of the ship, whoever was the occupier. (3) The only condition precedent to para. (*b*) coming into effect was contained in the words " where the ship is being repaired in public dry dock." It was not a compelling factor that

para. (*b*) provided for a division of duties between the shipowner and the repairer who was a notional occupier; it was obviously reasonable to make the latter, should he exist, provide for the safety of the openings used in the course of repair. In support of their second submission the appellants argued that the regulations were made in respect of the construction and repair of ships in shipbuilding yards and were designed to protect persons employed in such construction and repair in such premises and were not designed to protect persons who happened to have employment wholly unconnected with the repair of ships and who were not even employed by any repairing contractors. This raised the question whether the duty was owed only to persons employed in the processes which the regulations envisaged. His lordship accepted the two basic principles (1) that regulations could not lawfully be made in favour of persons outside the class of those for whose benefit Parliament authorised the making of the regulations, and (2) that if the regulations themselves defined the class of persons benefited, then a regulation could not benefit persons outside that class. It was not beyond the powers given to the Secretary of State by s. 79 of the Factory and Workshop Act, 1901, to make regulations which enured for the benefit of persons employed in the factory, even if they were not employed in the process which caused danger or injury to health. Such a process, unless regulated, might be dangerous to others whose ordinary work in the factory brought them into regular proximity with the danger. The case of a man ordinarily and regularly employed in the ship which was part of a factory was within s. 79. Both the workmen employed by the repairers and the crew were working together in the ship exposed to the changes and dangers entailed by the repairing process. The regulations enured for the benefit of the crew. The appeal should be dismissed.

The other noble and learned lords agreed. Appeal dismissed.

APPEARANCES: *J. S. Watson*, Q.C., and *Melville Kennan* (*Hill, Dickinson & Co.*); *Rose Heilbron*, Q.C., and *Henry Lachs* (*Mawby, Barrie & Letts*, for *Silverman & Livermore*, Liverpool).

[Reported by F. COWPER, Esq., Barrister-at-Law] **[3 W.L.R. 993**

Court of Appeal

MEASURE OF DAMAGES: CONTRACT FOR HIRE OF TELEPHONE EQUIPMENT: PREMATURE DETERMINATION BY HIRER

Interoffice Telephones, Ltd. *v.* Robert Freeman Co., Ltd.

Jenkins, Parker and Pearce, L.JJ. 24th October, 1957

Appeal from Pilcher, J.

By an agreement in writing made in 1950 the plaintiffs undertook to instal, let and maintain, and the defendants to take delivery of and hire, a twenty-five-line automatic telephone installation. The contract was for twelve years, continuing annually thereafter until either party should give notice in writing. There were subsequent supplemental agreements covering additions to the system. In 1956 the defendants were forced to leave their existing premises and to move to another office, which was already equipped with an automatic telephone system; they accordingly repudiated the agreements. At the hearing before Pilcher, J., the plaintiffs proved that they held a sufficient stock of equipment to meet anticipated demands from potential customers. Pilcher, J., held that the plaintiffs must be treated as having re-let the equipment to another customer after a reasonable interval of six months, and limited the award of damages to the lost rental for six months plus expenses of removal and reconditioning. The plaintiffs appealed on the question of damages.

JENKINS, L.J., said that the plaintiffs' submission on the calculation of damages was as follows: the starting figure was the total loss of rental for the unexpired period of the agreement; from that should be deducted 15 per cent. for maintenance, a discount in respect of the receipt in one sum of an amount payable over the years under the contract, and the depreciated value of the equipment removed; to these should finally be added the cost of reconditioning such equipment. That was based on the fact that the plaintiffs always had a supply to meet any demand, so that any substituted customer should not be regarded as re-hiring the defendants' abandoned equipment, but as taking over the new equipment which the plaintiffs held in stock, so that the substituted contract would not diminish the plaintiffs' loss. That was the principle adopted in *In re Vic Mill, Ltd.* [1913] 1 Ch. 465, a case of sale of goods, where the buyers, being in liquidation, had to refuse acceptance of machinery being made to their order by the sellers. Hamilton, L.J., said that a second customer was not a substituted customer, as if all had gone well the sellers would have had both orders and both profits. That case had been followed in *W. L. Thompson, Ltd.* v. *Robinson, Ltd.* [1955] Ch. 177, a case of a sale of a car where the supply was more than sufficient to satisfy the demand, whereas in *Charter* v. *Sullivan* [1957] 2 Q.B. 117, where the market was the other way, the decision was different. Salter, J., in *British Stamp and Ticket Automatic Delivery Co., Ltd.* v. *Haynes* [1921] 1 K.B. 377, which was concerned with a hiring contract of machines, decided the measure of damages applicable was the rent lost until a reasonable time for re-hiring, but, allowing for the fact that one case was concerned with sale of goods and the other with hiring, that case could not stand in so far as it conflicted with *In re Vic Mill, Ltd., supra.* In a recent unreported case, Barry, J., had held that there was no distinction between a case of sale and a case of hiring. That decision was right; there was no reason to distinguish *In re Vic Mill, Ltd., supra.* Damages should be assessed in accordance with the plaintiffs' contentions, and the appeal should be allowed.

PARKER and PEARCE, L.JJ., agreed. Appeal allowed.

APPEARANCES: *H. V. Lloyd-Jones*, Q.C., and *P. J. M. Thomas* (*Lewis & Dick*); *J. D. May* (*John L. Rendall*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[3 W.L.R. 971**

ESTATE DUTY: PECUNIARY LEGACIES TO BE PAID "FREE OF DUTY" AFTER TWO SUCCESSIVE LIFE INTERESTS

***In re* McNeill, deceased; Royal Bank of Scotland *v.* MacPherson and Others**

Lord Evershed, M.R., Romer and Ormerod, L.JJ.

29th October, 1957

Appeal from Upjohn, J.

By his will dated 23rd March, 1934, Neil McNeill gave his residuary estate to his trustee on trust for sale and conversion in the usual form and directed his trustee, the plaintiff bank, to divide the trust estate into two moieties. One moiety was to be held on trust to pay the income to the testator's brother, Alexander, for life free of duty, and the income of the other moiety was to be paid to the testator's sister, Eila, during her life free of duty. On the death of either, the income of the moiety concerned was to go over to the survivor during his or her life free of duty. Subject to these life interests, the trustee was to pay certain pecuniary legacies "free of duty" and subject thereto "and to the duty thereon" to pay the residue to named persons. The testator died in 1935, Alexander died in 1947, and Eila died in 1956. On the true construction of the will it was decided, affirming Upjohn, J., that the expression "free of duty" in relation to the deferred pecuniary legacies was not apt to exempt the legacies from liability to pay estate duty but was intended to apply only to legacy duty which had been abolished since the date of the will by the Finance Act, 1949, s. 27. The question then arose as to whether the legatees were liable to contribute a proportion of the estate duty chargeable not only on the death of Eila, but also of the estate duty chargeable on Alexander's death in respect of his moiety of the trust fund (Upjohn, J., having decided in default of argument that as regards the legacies payable out of the brother's fund they were liable to both sets of duty).

ROMER, L.J., read the judgment of the court. His lordship said that if the legatees were so liable it could only be (1) because there was some statutory provision to that effect, or (2) because of the terms of the will, or (3) because of some principle of equity imposing liability. After referring to ss. 8 (4), 9 (1) and 14 (1) of the Finance Act, 1894, he said that the first ground did not apply. Nor, said his lordship, did the second. Dealing with the third ground he said that the suggested equity would give rise to difficulties and hardships and it was difficult to see why the legatees should be subject to a rateable proportion of estate duty which became payable on a death which brought them no beneficial interest. The "well established principle" referred to in *Berry* v. *Gaukroger* [1903] 2 Ch. 116 did not apply as the charge imposed by s. 9 (1) of the Finance Act, 1894, on the

brother's fund had ceased to exist when the duty was paid. The respondents has relied on *In re Charlesworth's Trusts* [1912] 1 Ch. 319, in which Joyce, J., had wrongly, in his lordship's view, applied *Berry* v. *Gaukroger*. The distinction between those cases had been emphasised by Romer, J., in *In re Viscount Portman's Estate* (*No. 2*) [1925] Ch. 294, and although in that case he followed *In re Charlesworth's Trusts* he did so on a ground not applicable in the present case, and it should not be treated as covering such a case. *In re Hicklin* [1917] 2 Ch. 278 was also distinguishable. His lordship concluded that there was no equitable principle or other ground requiring the legatees to contribute to the estate duty payable on the death of the brother. Appeal allowed on that point.

APPEARANCES: *R. Cozens-Hardy Horne* (*Rider, Heaton, Meredith & Mills*); *John Bradburn*; *J. A. Wolfe* (*Simon, Haynes, Barlas & Cassels*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [3 W.L.R. 1007

LICENCE OR TENANCY: EXCLUSIVE OCCUPATION: MEMBERS' CLUB: LAWN TENNIS CLUB: WHETHER BUSINESS TENANCY

Addiscombe Garden Estates, Ltd., and Another *v.* Crabbe and Others

Jenkins, Parker and Pearce, L.JJ. 15th November, 1957

Appeal from Hilbery, J. ([1957] 2 W.L.R. 964; *ante*, p. 410).

By s. 23 (1) of Pt. II of the Landlord and Tenant Act, 1954, security of tenure is given (in certain circumstances) to any tenancy "where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him. . . ." By s. 23 (2) "the expression 'business' includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate." The trustees of a members' lawn tennis club registered under the Industrial and Provident Societies Act, 1893, and which, by its rules, carried on the business of a lawn tennis club, entered into an agreement with the owners of tennis courts and clubhouse, whereby the owners purported to license and authorise the trustees to use and enjoy the premises for two years from 1st May, 1954, in consideration of monthly payments of "court fees." The agreement contained a number of clauses providing, *inter alia*, that the defendants should repair and maintain the premises "in good tenantable repair and condition" and render them up at the expiry of the "licence" in such condition; permit the "grantors" and their agents "at all reasonable times to enter the premises to inspect their condition and for all other reasonable purposes." The owners, on their part, agreed, *inter alia*, that the "grantees" should "quietly enjoy" the premises without interruption. The agreement also contained a provision that the "grantors" might "re-enter and determine the licence in the event of non-payment of any of the said payments of court fees . . . or on any breach of the grantees' stipulations." The agreement expired on 1st May, 1956, but thereafter the trustees continued to occupy and use the premises, asserting that the agreement granted them a tenancy which was protected by Pt. II of the Act of 1954. In a claim by the owners for injunctions to restrain the trustees from trespassing and ordering them to quit and yield up the premises, Hilbery, J., held that the agreement of 12th April, 1954, must be construed as a tenancy agreement and not as a licence, and that this tenancy was protected by Pt. II of the Landlord and Tenant Act, 1954. The plaintiffs appealed.

JENKINS, L.J., said that as to the first question—whether the so-called licence of 12th April, 1954, in fact amounted to a tenancy agreement under which the premises were let to the trustees—the principles applicable in resolving a question of this sort were these: It did not necessarily follow that a document described as a licence was merely on that account to be regarded as amounting only to a licence in law. The whole of the document must be looked at; and if, after it had been examined, the right conclusion appeared to be that, whatever label might have been attached to it, it in fact conferred and imposed on the grantee in substance the rights and obligations of a tenant, and on the grantor in substance the rights and obligations of a landlord, then it must be given the appropriate effect, that was to say, it must be treated as a tenancy agreement as distinct from a mere licence. His lordship examined the various provisions of the agreement and said that he was of opinion that Hilbery, J., was perfectly right in holding that this was a tenancy. Counsel for the plaintiffs had referred to *Errington* v. *Errington* [1952] 1 K.B. 290. In that case it was held that in very unusual circumstances a lady was a licensee, and entitled to remain in occupation of premises so long as she paid the instalments on a certain mortgage; and in the course of his judgment, Denning, L.J., had said: "The test of exclusive possession is by no means decisive." He (his lordship) thought that wide statement must be treated as qualified by Denning, L.J.'s observations in *Facchini* v. *Bryson* [1952] 1 T.L.R. 1386, 1389, and it seemed to him that, save in exceptional cases of the kind mentioned by Denning, L.J., in that case, the law remained that the fact of exclusive possession, if not decisive against the view that there was a mere licence as distinct from a tenancy, was at all events a consideration of the first importance. In the present case there was not only the indication afforded by the provision which showed that exclusive occupation was intended, but there were all the various other matters which he had mentioned, which appeared to him to show that the actual interest taken by the grantees under the document was the interest of tenants, and not the interest of mere licensees. As to the second question, counsel for the plaintiffs had contended that although this might be a tenancy agreement, the tenancy was not one to which the Landlord and Tenant Act, 1954, applied because the premises were not "occupied for the purpose of a business." Counsel had said all that possibly could be said in favour of the view that the premises here in question were not occupied for the purposes of a business carried on by the tenants. But, in his (his lordship's) view, the plain language of the Act was too strong for him. Here the premises were used for the activities of a body of persons called the Shirley Park Lawn Tennis Club, and activities were there carried on, whether one should look at the individual members, or at the incorporated body. "A body of persons, whether corporate or unincorporate"—it mattered not which—was carrying on on the premises an activity in the shape of a lawn tennis club. The premises were, therefore, in his judgment, the subject of a tenancy to which the Act applied. Accordingly this appeal failed, and should be dismissed.

PARKER, L.J., delivered a concurring judgment.

PEARCE, L.J., agreed. Appeal dismissed. Leave to appeal refused.

APPEARANCES: *Lionel Blundell* (*Summer & Co.*); *Charles Fletcher-Cooke* (*Currey & Co.*).

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law] [3 W.L.R. 980

RATING: NOTICES TERMINATING ALLOWANCES: WHETHER PREMATURE

St. Pancras Borough Council *v.* University of London

Lord Evershed, M.R., Romer and Ormerod, L.JJ.
22nd November, 1957

Appeal from Wynn Parry, J. ([1957] 1 W.L.R. 778; *ante*, p. 464).

On 21st March, 1956, notices dated 20th March, 1956, were served by the plaintiffs, St. Pancras Borough Council, on the defendants, the University of London, informing them of the withdrawal as from 31st March, 1959, of the limitation on the defendants' liability for rates conferred by s. 8 (2) (*b*) of the Rating and Valuation (Miscellaneous Provisons) Act, 1955, in relation to certain properties of the defendants there referred to, which included University College (the main assessment) and a number of other properties. The first year of the new valuation list under the Act for the rating area of the plaintiffs began on 1st April, 1956. The question was whether, on the true construction of s. 8 (3), the notices were valid and effective. If the notices were ineffective on the ground that they could not be validly served until a year subsequent to "the first year of the new list," it would be necessary for the plaintiffs to serve new notices, in which case the said privileges could not be terminated until 31st March, 1961, at the earliest. Wynn Parry, J., held that the notices in question were prematurely given and were invalid. The plaintiffs appealed.

LORD EVERSHED, M.R., said that this was a plain case; and he entirely agreed with the conclusion which Wynn Parry, J., reached. But he (his lordship) must just add one qualification or reservation. So far as this case was concerned it sufficed to say that, in his judgment "has effect" in s. 8 (3) could not be

given the meaning "operation in law"; so that the notice which was here given on 21st March, 1956, was a bad notice. A view had been intimated (which counsel for the defendants was prepared to support as an alternative in the notice that he had given upon this appeal) that at any rate an effective notice under subs. (3) could not be given before the first year of the new list had begun. After the first year of the new list had begun—after, that was to say, para. (*a*) of subs. (2) had come into practical effect—it then followed that para. (*b*) would ensue in effect unless the organisation ceased to exist or altered its character, or some supervening event of that sort occurred. So it might be said that, although para. (*b*) was not in effective operation in this case before 1st April, 1957, at any rate after 1st April, 1956, its future operation could be forecast with reasonable certainty. In the view that he (his lordship) took, it was unnecessary to express any opinion upon that point; and he therefore desired to leave open for future argument (if it should ever arise) the question whether an effective notice under subs. (3) might be given during the first year of the new list. His present inclination, he confessed, was against that view; but he expressed no final conclusion upon it. So far as this case was concerned it sufficed to say that this notice, given, as it was, on 21st March, 1956, was premature and invalid. He therefore would dismiss the appeal.

ROMER, L.J., delivered a concurring judgment.

ORMEROD, L.J., agreed. Appeal dismissed.

APPEARANCES: *R. E. Megarry*, Q.C., and *C. F. Fletcher-Cooke* (*R. C. E. Austin*); *R. O. Wilberforce*, Q.C., and *W. B. Harris* (*Slaughter & May*).

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law] [1 W.L.R. 1214

Queen's Bench Division

DAMAGES: FATAL ACCIDENT: WHETHER WEEKLY PAYMENTS UNDER PENSION SCHEME TO BE TAKEN INTO ACCOUNT

O'Neill *v.* S. J. Smith & Co. (Bidford), Ltd., and Another

Hallett, J. 2nd July, 1957

Action tried at Nottinghamshire Assizes.

A miner having been killed in a street accident, an action was commenced by his widow under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934. On his death the widow and her infant children became entitled to weekly sums payable under a mine-worker's contributory pension scheme. It was contended by the defendants that the benefits received under the pension scheme should be taken into account, and that they were not sums "paid or payable . . . under any contract of assurance or insurance" required to be left out of account by virtue of s. 1 of the Fatal Accidents (Damages) Act, 1908.

HALLETT, J., said that the facts in the present case were very different from those in *Bowskill* v. *Dawson* (No. 2) [1955] 1 Q.B. 13. In the present case there was no question of any contract of insurance or assurance between anybody which gave rise to these payments in favour of the widow and children. Whatever the Legislature might think right to do in the future, having regard to the way in which these pension schemes had now become so general and so important in the nationalised industries, the *prima facie* obligation to give credit for benefits received after a death which was displaced by s. 1 of the 1908 Act had not been displaced in the present case. If one wished to make use of that exception, one must show that one came clearly within its terms; but in the present case the plaintiff was clearly outside the terms of the exception. The second point raised by the defendants was that the section related to sums paid or payable on the death of the deceased, and that contemplated a lump sum then payable and not the commencement of payment of weekly or monthly sums. Although that was rather a fine reading of the words of the section, it was in his lordship's opinion correct. For these reasons account should be taken of the benefits received by the widow and children under the pension scheme.

APPEARANCES: *D. M. Cowley* (*German & Soar*, Beeston); *A. J. Flint* (*Browne, Jacobson & Roose*, Nottingham).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [1 W.L.R. 1204

LIMITATION OF ACTION: INJURY PARTLY CAUSED OUTSIDE STATUTORY PERIOD

Clarkson *v.* Modern Foundries, Ltd.

Donovan, J. 29th July, 1957

Action.

The plaintiff was employed in the defendants' iron foundry from 1940 to 1951. In May, 1951, he was found to be suffering from pneumoconiosis. On 19th August, 1955, the plaintiff issued a writ alleging breaches of statutory duty, on which he succeeded. The defendants pleaded, *inter alia*, that they were only liable in respect of a cause of action arising on or after 19th August, 1949, and submitted that the inference was that the plaintiff contracted pneumoconiosis before that date. On the medical evidence the judge found that each year from 1940 to 1951, during which the plaintiff was exposed to pathogenic dust, played its part in producing the disease and that the two years between August, 1949, and August, 1951, made a material contribution to the severity of the disease, which in all probability already existed before 1949. By their defence the defendants pleaded that if and so far as the plaintiff relied on any cause of action which accrued prior to August, 1949, the same was statute barred, and they relied on s. 2 of the Limitation Act, 1939.

DONOVAN, J., said that the defendants were in breach of their statutory duty before the plaintiff contracted pneumoconiosis, and it was caused by that breach. The question was simply whether the plaintiff was too late to recover in respect of his whole injury. The *ratio decidendi* of *Bonnington Castings, Ltd.* v. *Wardlaw* [1956] A.C. 613 obliged his lordship to hold that, once the plaintiff showed that exposure to this dust contributed materially to his injury from August, 1949, to 1951, he was entitled to recover in respect of his whole injury although part was suffered before August, 1949. Judgment for the plaintiff.

APPEARANCES: *G. S. Waller*, Q.C., and *R. P. Smith* (*W. H. Thompson*); *R. Lyons*, Q.C., and *R. Withers Payne* (*Bromley & Walker*, Leeds).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [1 W.L.R. 1210

SOLICITOR: DISCIPLINE: LARCENY BY SOLICITOR'S CLERK OF PROPERTY NOT BELONGING TO SOLICITOR OR CLIENT: ORDER AGAINST CLERK MADE AS RESULT OF ACT PASSED SUBSEQUENT TO CONVICTION

***In re* A Solicitor's Clerk**

Lord Goddard, C.J., Barry and Havers, JJ.

22nd November, 1957

Appeal from an order of the Disciplinary Committee.

An application was made to the Disciplinary Committee on behalf of The Law Society for an order directing that no solicitor should in connection with his practice as a solicitor take or retain the appellant, an unadmitted solicitor's clerk, into or in his employment or remunerate him without the permission of The Law Society. The allegation made against the clerk was that he had been guilty of such conduct as to justify an order being made in respect of him under s. 16 (1) of the Solicitors Act, 1941, as amended by s. 11 (1) of the Solicitors (Amendment) Act, 1956. By s. 16 (1) of the Act of 1941 where a solicitor's clerk who was not himself a solicitor had been convicted of "larceny, embezzlement, fraudulent conversion or any other criminal offence in respect of any money or property belonging to or held or controlled by the solicitor by whom he was employed or of any client of that solicitor" an application to the Disciplinary Committee could be made. The amending Act, which came into force in November, 1956, allowed The Law Society to apply to the committee for an order where a clerk had been convicted of "larceny, embezzlement or fraudulent conversion" irrespective of whether the property concerned belonged to his employer or one of his clients. At the inquiry, it was proved that the appellant had been convicted of larceny in 1953, but that the offences were not connected in any way with money or property belonging to the solicitor by whom he was employed or any client of his. The committee, however, found the allegation made by The Law Society substantiated; that the wording of s. 16 (1) of the Solicitors Act, 1941, as amended by s. 11 (1) of the amending Act of 1956 clearly covered the case, since it expressly provided that proceedings might be instituted before them in any

case where a person who was or had been a clerk to a solicitor had been convicted of larceny. They accordingly made the order, to take effect from 20th September, 1957, and ordered the clerk to pay the costs of the inquiry. The clerk appealed.

LORD GODDARD, C.J., said that the appellant contended that to apply the provisions of the Act of 1956 to a person convicted before that Act came into operation would be to make its operation retrospective. In Maxwell on the Interpretation of Statutes it was stated that it was a fundamental rule of English law that no statute should be construed to have a retrospective operation unless such a construction appeared very clearly in the terms of the Act or arose by a necessary or distinct implication, and that passage had received judicial approval by the Court of Appeal (see *West* v. *Gwynne* [1911] 2 Ch. 1). But this Act was not in truth retrospective. It enabled an order to be made disqualifying a person from acting as a solicitor's clerk in the future, and what happened in the past was the cause or reason for the making of the order, but the order had no retrospective effect. It would be retrospective if the Act provided that anything done before it came into force or before the order was made should be void or voidable, or if a penalty were inflicted for having acted in any capacity before the Act came into force or the order was made. The Act simply enabled a disqualification to be imposed for the future which in no way affected anything done by the appellant in the past. Accordingly, the committee had jurisdiction to make the order and the appeal failed.

BARRY and HAVERS, JJ., agreed. Appeal dismissed.

APPEARANCES: *Gabriel Cohen* and *James Borders* (*Linsley-Thomas & Joslin*); *J. R. Cumming-Bruce* (*Hempsons*).

[Reported by MRS. E. M. WELLWOOD, Barrister-at-Law] [1 W.L.R. 1219

IN WESTMINSTER AND WHITEHALL

HOUSE OF LORDS

PROGRESS OF BILLS

Read First Time :—

British Nationality Bill [H.L.] [3rd December.

To amend the British Nationality Act, 1948, by making provision in relation to the Federation of Rhodesia and Nyasaland and to Ghana, by extending the provisions for registering persons as citizens of the United Kingdom and Colonies, by extending and providing for the discharge of the functions in Commonwealth countries of High Commissioners for Her Majesty's Government in the United Kingdom, and for purposes connected therewith.

Public Works Loans Bill [H.C.] [3rd December.

Solicitors (Scotland) Bill [H.L.] [5th December.

To amend the law relating to solicitors and notaries public in Scotland, and for purposes connected therewith.

Read Second Time :—

British Transport Commission Order Confirmation Bill [H.C.] [3rd December.
Entertainments Duty Bill [H.L.] [5th December.
Expiring Laws Continuance Bill [H.C.] [5th December.
Life Peerages Bill [H.L.] [5th December.
Yarmouth Naval Hospital Transfer Bill [H.C.] [5th December.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read First Time :—

Overseas Service Bill [H.C.] [6th December.

To authorise the Secretary of State to appoint officers available for civilian employment in public services overseas; to make provision as to superannuation in respect of officers so appointed, and to make further provision with respect to the overseas service of police officers; and for purposes connected with the matters aforesaid.

Read Second Time :—

Divorce (Insanity and Desertion) Bill [H.C.] [6th December.
Import Duties Bill [H.C.] [2nd December.
Opticians Bill [H.C.] [6th December.
Post Office and Telegraph (Money) Bill [H.C.] [5th December.
Road Transport Lighting (Amendment) Bill [H.C.] [6th December.
Variation of Trusts Bill [H.C.] [6th December.

In Committee :—

Isle of Man Bill [H.C.] [2nd December.
New Towns Bill [H.C.] [5th December.

B. QUESTIONS

CHARITABLE ORGANISATIONS (ACCOUNTS)

The SOLICITOR-GENERAL said that he was not aware of any general public demand for an amendment of the law to provide for a legal obligation to be placed upon charitable organisations to account for the sums of money collected by them from the general public. In the case of an endowed charity, accounts had to be rendered to the Charity Commissioners. In the case of other charities it would be his duty to institute proceedings if there was sufficient evidence of any misappropriation of funds.

The Solicitor-General also declined to introduce legislation to establish, under the control of the Charity Commissioners, a central pool of undistributed funds raised for specific charitable purposes which could be used for other deserving purposes duly arising. He said that if there appeared to have been a general charitable intention on the part of the donors, the court or the Charity Commissioners had power to make a scheme for applying any undistributed funds *cy près*, i.e., for charitable objects as nearly like as possible to the original one. He was not satisfied that, if there was no such intention, it would be necessarily right to take power by legislation to appropriate the funds for a central pool. [3rd December.

STATUTORY INSTRUMENTS

Air Navigation (Eighth Amendment) Order, 1957. (S.I. 1957 No. 2050.) 5d.

Bacon and Pigs Boards' (Dissolution) Order, 1957. (S.I. 1957 No. 2078.) 5d.

Consular Conventions (Federal Republic of Germany) Order, 1957. (S.I. 1957 No. 2052.) 5d.

Consular Conventions (Italian Republic) Order, 1957. (S.I. 1957 No. 2053.) 5d.

County Court Funds (Amendment) Rules, 1957. (S.I. 1957 No. 2094 (L.20).) 4d.

These Rules increase the rate of interest allowed on money standing in an investment account in the county court from 3¼ per cent. to 3½ per cent. per annum.

County of Kent (New Streets) Order, 1957. (S.I. 1957 No. 2046.) 4d.

Emergency Laws (Continuance) Order, 1957. (S.I. 1957 No. 2057.) 5d.

Emergency Laws (Miscellaneous Provisions) (Colonies, etc.) Order in Council, 1957. (S.I. 1957 No. 2058.) 5d.

Hong Kong (Appeal to Privy Council) (Amendment) Order in Council, 1957. (S.I. 1957 No. 2059.) 4d.

Import Duties (Exemptions) (No. 16) Order, 1957. (S.I. 1957 No. 2045.) 5d.

London Traffic (Prescribed Routes) (Richmond) Regulations, 1957. (S.I. 1957 No. 2063.) 4d.

London Traffic (Weight Restriction) (St. Marylebone) Regulations, 1957. (S.I. 1957 No. 2064.) 4d.

Marriages Validity (Christ Church, Camberwell) Order, 1957. (S.I. 1957 No. 2093.) 5d.

National Assistance (Determination of Need) Amendment Regulations, 1957. (S.I. 1957 No. 2072.) 5d.

National Insurance (No. 2) Act, 1957 (Commencement) Order, 1957. (S.I. 1957 No. 2073 (C.21).) 5d.

Draft National Insurance (Industrial Injuries) (Mariners) Amendment Regulations, 1957. 5d.

Draft National Insurance (Mariners) Amendment Regulations, 1957. 5d.

Nigeria (Electoral Provisions) Order in Council, 1957. (S.I. 1957 No. 2060.) 5d.

Patents (Extension of Period of Emergency) Order, 1957. (S.I. 1957 No. 2062.) 4d.

Penzance Corporation Water Order, 1957. (S.I. 1957 No. 2069.) 9d.

Petty Sessional Divisions (Montgomeryshire) Order, 1957. (S.I. 1957 No. 2041.) 5d.

Draft **Pneumoconiosis and Byssinosis** Benefit Amendment Scheme, 1957. 5d.

Draft **Police** Pensions Regulations, 1958. 6d.

Draft Police Pensions (Scotland) Regulations, 1958. 6d.

Police (Scotland) Amendment (No. 4) Regulations, 1957. (S.I. 1957 No. 2039 (S.102).) 5d.

Purchase Tax (No. 2) Order, 1957. (S.I. 1957 No. 2068.) 8d.

Retention of a Main and Pipes under Highways (County of Leicester) (No. 1) Order, 1957. (S.I. 1957 No. 2035.) 5d.

River Hull (Navigation) Rules Order, 1957. (S.I. 1957 No. 2051.) 5d.

Staffordshire (New Streets) Order, 1957. (S.I. 1957 No. 2047.) 4d.

Stopping up of Highways (City and County Borough of Bath) (No. 1) Order, 1957. (S.I. 1957 No. 2031.) 5d.

Stopping up of Highways (County of Berks) (No. 12) Order, 1957. (S.I. 1957 No. 2032.) 5d.

Stopping up of Highways (City and County Borough of Coventry) (No. 8) Order, 1957. (S.I. 1957 No. 2042.) 5d.

Stopping up of Highways (County of Durham) (No. 9) Order, 1957. (S.I. 1957 No. 2034.) 5d.

Stopping up of Highways (County of Durham) (No. 10) Order, 1957. (S.I. 1957 No. 2043.) 5d.

Stopping up of Highways (London) (No. 72) Order, 1957. (S.I. 1957 No. 2044.) 5d.

Stopping up of Highways (London) (No. 79) Order, 1957. (S.I. 1957 No. 2065.) 5d.

Stopping up of Highways (County of Southampton) (No. 12) Order, 1957. (S.I. 1957 No. 2037.) 5d.

Stopping up of Highways (County of Warwick) (No. 20) Order, 1957. (S.I. 1957 No. 2033·) 5d.

Stopping up of Highways (County of Warwick) (No. 21) Order, 1957. (S.I. 1957 No. 2066.) 5d.

Stopping up of Highways (County of York, West Riding) (No. 24) Order, 1957. (S.I. 1957 No. 2067.) 5d.

Supplies and Services (Continuance) Order, 1957. (S.I. 1957 No. 2056.) 4d.

Traffic Regulation Orders (Procedure) (Scotland) Regulations, 1957. (S.I. 1957 No. 2038 (S.101).) 8d.

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 21 Red Lion Street, London, W.C.1. Prices stated are inclusive of postage.]

CASES REPORTED IN VOL. 101

5th October to 14th December, 1957

Lists covering all cases reported earlier this year appear in the Interim Index (to 29th June) and at p. 716, *ante* (6th July to 31st August)

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